Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

MERANIA MURINGU MACHARIA, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the Federal Tort Claims Act ("FTCA"), individual acts of garden variety venal negligence are now always discretionary, and thus immunized, merely because they can be bundled together and treated generally as negligence relating to "Security."

2. Whether the FTCA's foreign country exception protects the United States from a security contractor's negligence, which resulted in the deaths of hundreds and the injuries of thousands of Kenyans at the US Embassy in Nairobi, Kenya.

3. Whether the unjustified confinement and the disparate treatment of Kenyans following the attack on the US Embassy by Usama bin Laden and *al Qaeda* were insufficiently prolonged, and insufficiently systematic, as a matter of law, to warrant relief under the International Convention on Civil and Political Rights.

LIST OF PARTIES

The following parties appeared below as appellants and appear in this Court as petitioners:

Merania Muringu Macharia Personal Representative Of Agatha Ann Njoki (Deceased), Gladys Mumbi Mwangi Personal Representative Of Roselyn Wanjiky Mwangi (Deceased), Geoffrey Njau Gichia Personal Representative Of Jacinta Njoki Njau (Deceased), Matthews Onyango Personal Representative Of Jennifer Atieno Onyango (Deceased), Noah Thuo Kimani Personal Representative Of Felista Njeri Thuo (Deceased), Loise Njeri Nganga Personal Representative Of Elizabeth Wanjiku Ng'ang'a (Deceased), Alice Muthoni Kamua Personal Representative Of Joseph Kamau Kiongo (Deceased), Janet Waruguru Kibaki Personal Representative Of Simon Mwangi Njima (Deceased), Pamela Alouch Osweta Personal Representative Of Monica Apondi Anyango (Deceased), Margaret Achieng Jow Personal Representative Of Doreen Alouch Jow (Deceased), Jane K. Naivasha Personal Representative Of Abel Mutegi (Deceased), Mary Muthoni Ndungu Personal Representative Of Francis Ndungu Mbugua (Deceased), Opportune Mogo (Deceased), Mirian Oriendo Personal Representative Of Sylvia Edna Ambasa (Deceased), Serah Andenyi Malaki, Personal Representative Of Frederick Ezra Ochieng (Deceased), Macleod Wayama Anyanzwa Personal Representative Of Catherine Muketi Ibere Weyamas (Deceased), Mustafa Aban Hashi Personal Representative Of Burhan Aden Hashi (Deceased), Mohamed Hukay Guracha, Representative Of Hassan Hukay Guracha, Dillia Mutaka Mwani, Representative Of Moses Ashton Mwani (Deceased), Lucy Wangari Gachagwi, Jeniffer Mwongeli Mulili, Emmanuel Kioko Muema, Hedwig Yohanine Kibukosya, Rosemary Njeri Miringu, Patrick Kizengwa Kilaya, Bernard Gituto Maina, Alexander Manyeago Shiakwila, Beatrice Atieno Omiti, Pauline Wambui Njihia, Gardy Nyadero Onguru, Bruno Kinyua Nicasio, Mohamed Kanya Mwangi, Jackson Munala, Evans Mukunga Muita, Douglas Kairu Muriithi, Harakhchand P.

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Gikonyo Kimani, David Waithagi, Alex Kamau Wakaba, Lucy Lenny Kisia, Fortunatus W. Ndgewa, Priscilla Ambalo Athanas, Rachel Ames Amolo, Harriet Mgazo Mwaighcho, Jane Tsivove Mwale, Gladys Wangui Nderitu, Peggy Felicity Aloo, Mbai & Kibuthu Advocates.

No appellant has a parent corporation, and no publicly-held company owns 10% or more of the stock of any appellant. These representations are made, *inter alia*, so that judges of this court may evaluate possible disqualification or recusal.

The following party appeared below as appellee, and will appear in this Court as respondent:

The United States of America.

No other parties appeared below or have entered an appearance in this Court. No *amici* appeared below or have entered an appearance in this Court.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

No petitioner is owned or held in whole or in part by a parent corporation. No publicly held corporation owns 10% or more of the stock of any petitioner.

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Away from Justice and Fairness: The Foreign Country exception to the Federal Tort Claims Act, 22 Loy. L.A. L.R. 603 (Sprint 1989) 24

Charles A. Wright, et al., *13B Federal Practice and Procedure* § 3585 (1988 ed.) 27

Fishback, DS and Killefer, G, *The Discretionary Function Exception to the Federal Tort Claims Act: Dalehite to Varig to Berkovitz*, 25 Idaho L.R. 291 (1989) 12

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OPINIONS BELOW

Final judgment was entered by the United States District Court for the District of Columbia on July 30, 2002. It is reported at 238 F. Supp. 2d 13. It is reproduced at, Appendix 16a-47a.

Appellants noted their appeal to The United States Court of Appeals for the District of Columbia Circuit on August 2, 2002. The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on July 11, 2003. The opinion is reported at 334 F.3d 61. It is reproduced at Appendix, 1a-15a.

STATEMENT OF JURISDICTION

The action was brought pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.*, and pursuant to principles of international law. The trial court had subject matter jurisdiction pursuant to 28 U.S.C. § 1346 and pursuant to 28 U.S.C. § 1350.

The United States Court of Appeals for the District of Columbia Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The FTCA claims and defenses were based on 28 U.S.C. §§ 2671, 2674, and 2680. The relevant portions of 28 U.S.C. §§ 2671, 2674 and 2680 are reproduced at Appendix C.

Plaintiffs' international law claims referred, *inter alia*, to the International Covenant On Civil Political Rights ("ICCPR"). The ICCPR is reproduced at Appendix, 56a-91a.

STATEMENT OF THE CASE

Facts:

On August 7, 1998, a massive truck bomb exploded at the rear parking lot entrance to the United States Embassy in Nairobi, Kenya. The explosion killed hundreds, and injured thousands.

The Department of State ("DOS") conceded that "[w]ith these two posts[1] the Department gambled and lost." Without referring to the enormous losses sustained by the Kenyan Petitioners, DOS acknowledged that "[a]nytime you lose a

1. Nairobi, Kenya and Dar Es Salaam, Tanzania.

dozen Americans and over 30 local national employees to a terrorist bombing, at some level, you must call that a failure."

That failure was not at the discretionary level. Rather, it was the result of garden variety, mundane, yet critical neglect by headquarters employees, and by a security contractor employed and supervised by the United States.

As United States Ambassador to Kenya Prudence Bushnell later wrote:

> If the issue is *some bureaucrats second-guessing us, from the security of Washington*, about the nature of the threat, let me be blunt. Last year, when this mission raised the vulnerability of the previous embassy building, we received informal feedback that *'some' in Washington thought we were 'overreacting.'* The death of 44 American employees and some 200 Kenyans, and the wounding of 5000 people in Kenya alone, should have made clear to all the threat is all too real. (emphasis added)

A. The Bureau of Diplomatic Security, At its United States Headquarters, Was Responsible for Physical Security at the Embassy

"Physical security" is defined as "[t]hose measures necessary to protect the facility against the effects of unauthorized access, theft, fire, sabotage, loss, or other intentional crime or damage." The Bureau of Diplomatic Security (DS) in the Department of State is responsible for establishing and promulgating physical security standards, policies and procedures. DS is further responsible for ensuring that these standards, policies and procedures are incorporated into the appropriate guidance documents issued by other in the Foreign Affairs Community. DS is based in the United States. ("Headquarters" or "DS") Its main office is in the District of Columbia.

Headquarters issues the applicable standards for the physical security of the United States facilities overseas. Headquarters is responsible for communicating to each overseas facility changes in standards. All physical security upgrades must conform with Headquarters standards and must be specifically approved at Headquarters.

Most security-related equipment must be obtained through Headquarters.

Headquarters is responsible for the DOS technical security program, and the DOS security equipment program. Headquarters is also responsible for review of and modifications to each Post's Emergency Action Plan ("EAP"), and the implementing EAP Handbook.

Headquarters advised each of the Posts that: "Requests for expertise, equipment or personnel in the security field should be made to ..." Headquarters.

Headquarters conducts physical security reviews, and is ".... proactive ..." in its review of security at overseas facilities. By contrast, the RSO at Post typically lacks the expertise to address physical security upgrades. The RSO is also unlikely to implement physical security upgrades on his or her own. Headquarters does not encourage RSOs to use their own initiative with regard to physical security.

Headquarters is required to provide guidance in the field to RSOs with respect to vulnerabilities, and to conduct a survey, devise solutions, or "vet" a proposed solution. Headquarters must apply its own standards, and upgrades are subject to approval by a number of people at Headquarters. These procedures apply with regard to vehicle barriers, and to related upgrades, such as the simple installation of fixed barriers.

Prior to a security survey at a Post, the Headquarters team is required to review earlier records and recommendations. Those reports are likely to be at Headquarters, rather than at Post. During and subsequent to the survey, Headquarters is required to prepare and disseminate a comprehensive report.

The DS standard operating procedure for responding to security concerns required a response "... ASAP...." That policy also required improvements to be made "... as quickly as possible...," and to correct a "... security vulnerability ..." as "rapidly as possible."

In short, from its United States Headquarters, DS is responsible for post logistical support, as well as all of the technical, mechanical, scientific, security or construction issues related to the operation of existing United States facilities overseas.

Consistent with those responsibilities and instructions the Post in Nairobi relied entirely on Headquarters for physical security and information and guidance on security-related issues. The Post sought information, guidance and approval from DS Headquarters for each and all of the following: a January 1998 security survey, approval of EAP plans, a security fence, a $5200 roll up door, supplies of every kind, including knives, tape and bolts, stairwell repairs, an alarm system, and an FBO supplied contractor, a $750.00 bollard construction task, fire systems, window glazing, various types of commercial equipment, acquisition of metal detectors and scanners, and approval for minor security upgrades.

During the entire period, Headquarters controlled all issues of threat assessment and information dissemination, and all of the pertinent activities of the local guard force ("LGF") stationed at the Nairobi Post.

B. From No Later Than December 1997 Through August 7, 1998, Employees at DS Ignored Their Non-Discretionary Obligations to the Post, and Delayed Fulfilling Those Obligations

Commencing no later than December 1997, Headquarters failed to meet its clear, non-discretionary obligations to the Post employees, and, as a consequence, to Petitioners. The result was the death of hundreds, and the injury of thousands.

On December 24, 1997, Ambassador Bushnell wrote to DOS that the Nairobi Embassy was "extremely vulnerable to a terrorist attack." Post sought a visit by a security assessment team to assess ". . . . how we can lessen our vulnerabilities. . . ." Headquarters took no immediate action.

By February 1998, Headquarters delays caused Post officials to recognize that Ambassador Bushnell ". . . wants to be taken seriously or DS will be on her ____ list."[2] On February 12, Headquarters and Post exchanged cables. Headquarters wrote it would visit to assess and identify security upgrades that can reduce vulnerability at the Chancery. Post wrote that a March "security assessment . . . would be most welcome," and referred to review of the vehicle barrier and perimeter camera surveillance.

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2. DS vulnerability criteria improperly minimized African posts.

Yet in February, Headquarters grumbled internally about Ambassador Bushnell's requests, writing:

> .... You remember that when this original cable came in Dec it was addressed to both Boswell and A/S AF Rice? The AF bureau would not touch it. That's how it eventually became OP action. We further are not convinced that sending DS/ITA is really needed. It just puts DS in the defensive again.... Also, when you send your new CC cable we would recommend that you include a paragraph on your specific mission which is detailed in Boswell's response: An "assessment" to determine what, if any minor security projects/ upgrades can do to lesson [sic] the Chancery's vulnerabilities; short of a NOB.

Clearly, DS had no desire to fulfill its obligations or to seriously address Ambassador Bushnell's concerns. Rather, a cosmetic "assessment" was scheduled to mollify the Ambassador. A reduced team visited the Post from March 10 through March 13, 1998. The RSO believed, based on Headquarters' own statements, that the visit was designed in part to "... assess physical security upgrades...." Indeed, Ambassador Bushnell thanked Headquarters for the "security assessment," because she was wholly unaware that Headquarters never treated the visit as a "security review."

With the Headquarters team, RSO Hartnett-Kelly toured the Embassy premises, including the rear parking area. At that time, the primitive metal drop bar which guarded the rear garage entrance,[3] could not be secured because of a broken pin or bent arm.[4] The Local Guard Force manned full-time a guard post at the drop bar.

The Headquarters team told RSO Hartnett-Kelly that "he would look into it. He would try to find some help for us." In short, Headquarters reiterated its responsibility for identifying

3. The attack vehicle exploded inside the drop bar. As one report noted: "... the suspect vehicle actually breached the drop gate at Post C-5 and detonated between the drop gate and the grilled swing gate at Post C-4.".

4. This defect existed for one year, but was not reported "... up the chain of command." RSO Hartnett-Kelly was never advised of the defect.

solutions, and, at the same time, dissuaded the RSO from using her initiative. Tragically, that commitment went unfulfilled.

Though DS never issued to Post an end-user report, a report was prepared by the Headquarters team. Accompanied by photographs, the report correctly stated:

> A view of the West garage entrance. Note that Embassy is vulnerable to a heavy truck bomb attack. A truck with a reinforced front could possibly break through the drop-bar, the iron fencing gate, and the rolldown garage door. Also, someone could overpower the guard(s), blow up the drop bar and gate, then drive a car bomb into the garage.

The report reiterated that "... the west parking lot ... represents a car bomb threat. ..."

Yet, in violation of its own guideline, Headquarters never sent the report to Post.

As the undisputed declaration of Petitioner's security expert made clear, simple security upgrades, including improved vehicle barriers, were available.[5] DS was best equipped to advise or inform the RSO about those upgrades. Yet Headquarters failed to meet its duty to Post to provide its promised report and to fulfill its well-recognized obligations of guidance, approval and installation of security upgrades.

Accordingly, on April 24, May 5, and May 18,1998, Post cabled Headquarters, without response, about Post's security concerns. Significantly, the Ambassador, unaided by Headquarters, assumed that Post had "... exhausted post-specific ways of coping with security risks. ..."

Headquarters conducted another visit from June 9 to June 12, 1998. On June 26, 1998, Headquarters warranted that "the Department will also provide post with a trip report. ..."

Again, no report was issued. On July 14, and July 24, 1998, Post reminded Headquarters that Post needed the report.

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5. As early as 1992, Headquarters was advised that the C-5 gate uses "... a metal, manually operated, drop bar gate to allow access. These are inadequate to arrest a determined ram attempt. While a hydraulic restraint barrier is not required for a medium threat port, a more effective deterrent than the dropbar is necessary."

On August 5, 1998, two days before the attack, Headquarters finally issued a report in the form of a telegram.

The August 5 telegram was critical of local guard contractor UIIS. Among other failures, Headquarters determined that UIIS-employed guards with less than two (2) years experience in security or law enforcement; and the local guards did not have the capacity to effectively operate or be trained in the operation of the technical equipment, such as radios, cameras and long range sound equipment.

The report made no mention of the long-promised discussion of the rear parking area's vulnerability or of response mechanisms, including vehicle barriers, inspections, or bomb recognition training. In its report, under "vehicle barriers," Headquarters wrote "N/A." The report was also silent on the nature or availability of surveillance detection programs.

Barrier standards, set by Headquarters, regard drop bars as only "secondary barriers." By Headquarters' own standards, the rear of the Embassy was inadequately protected by a drop bar. In fact, as Headquarters knew or should have known, that drop bar could not be secured because of a bent pin. This Headquarters technical failure led directly to the success of the bombing attack.

Post-attack reports showed that Headquarters failed to undertake guidance or training with regard to vehicle inspection points. Simple identity card checks, or vehicle inspections, would have deterred the attack. Headquarters knew at the time that "[s]creening vehicles for explosives . . ." is an "important task." Headquarters was responsible for the equipment. However, no such equipment was in place at Post in August 1998. Post-attack reports also concluded that the Chancery had suffered from inadequate perimeter guard equipment, including the absence of alarms, and radios.

In addition, Headquarters had failed to undertake meaningful training in Surveillance Detection ("SD"). Surveillance of a target has preceded every large-scale terrorist attack. Surveillance of the Embassy, in fact, took place on August 3, 1998, and earlier.

Surveillance detection was and is a Headquarters responsibility. The training, operational details, personnel and

equipment were within Headquarters purview. SD training included the local guard forces, and was understood to be outside the scope and ability of the post RSO. Yet Headquarters did not fulfill its specific, technical and non-discretionary duty to apprise Post and its RSO of surveillance detection concepts or procedures.

In sum, Headquarters completely failed to provide to Post the technical or scientific guidance, training or information which it was required to provide on physical security. Its failures were as simple as the failure to fix a pin, mail a report, keep a promise or suggest simple upgrades, and as conventionally-negligent as the failure to train or oversee the local guards, or provide information or warnings.

As a horrible consequence, hundreds died and thousands were injured.

Proceedings Below:

This action was filed by 451 plaintiffs on December 10, 1999.[6] The complaint sought relief through four counts: negligence and inherent danger (Count One); nuisance(Count Two); violation of international law (Count Three); and the imposition of a constructive trust on assets of Usama bin Laden and *al Qaeda* (Count Four).

On August 11, 2000 the United States filed a Motion to Dismiss ("First Motion to Dismiss"), which sought dismissal of Counts One and Two for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), and dismissal of Counts Three and Four under Fed. R. Civ. P. 12(b)(6). The United States' jurisdictional arguments were based on 28 U.S.C. § 2680(a) (the "discretionary function exception") and 28 U.S.C. § 2680(k) (the "foreign country exception").

The First Motion to Dismiss was denied without prejudice by Order entered March 26, 2001. On July 16, 2001, Respondent

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6. Three other actions arising out of the August 7, 1998 embassy bomb blast in Nairobi, Kenya were filed in the trial court: *Odilla Mutaka Mwani, et al v. United States, et al.*, 99CV125; *Isaac Kabengi Ndambiri, et al. v. United States, et al.*, 99CV3086 and *Rosemary Wanjiru Bichage, et al. v. United States*, 00CV1636. *Ndambiri* was dismissed without prejudice by praecipe filed December 10, 1999. *Mwani* included claims against Usama bin Laden and *al Qaeda*. The trial court has declined to find personal jurisdiction over either defendant.

filed a second Motion to Dismiss. By *sua sponte* order filed January 2, 2002, the trial court denied without prejudice the Second Motion to Dismiss, and fixed a new motions schedule. On January 28, 2002, following limited jurisdictional discovery, the United States filed its Third Motion to Dismiss

The trial court issued its Final Order granting that motion on July 30, 2002. App. 16a.

Petitioners noted their appeal to the United States Court of Appeals for the District of Columbia Circuit on August 2, 2002. On July 11, 2003, the judgment of the trial court was affirmed. App. 1a.

REASONS FOR GRANTING THE PETITION

For the reasons set forth below, Petitioners respectfully pray that a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

I. The Circuit Court's Expansion of the Discretionary Function Exception In Cases Involving "Security" Is in Principled Conflict With Other Circuits, and Misconstrues the Decisions of this Court in a Case of Substantial Intrinsic, National and International Consequence

A. The Circuit Court's Expansion of the Discretionary Function Exception In Cases Involving Security Conflicts With Other Circuits And Misconstrues the Decisions of this Court

The Circuit Court's application of the discretionary function exception to the FTCA was flawed in two important respects: first, unlike the methodology used in *United States v. Gaubert*, 499 U.S. 315 ,111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *Berkovitz v. United States*, 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988), and their progeny, the Circuit Court declined to analyze individually each of the particular actions challenged by Petitioners. Instead, and erroneously, the Circuit Court adopted the trial court's election to bundle the particular actions into categories, so that the categories, rather than the individual actions, could be tested for elements of protected discretionary judgment; secondly, the Circuit provided, *sub silencio*, a blanket discretionary immunity to any category invoking "security."

Further, even assuming *arguendo* that the Circuit Court's methodology comported with this Court's treatment of the discretionary function exception, five of the Circuit Court's six categories have either been treated by other Circuits as outside the protection of the discretionary function exception, or, on their face, lack any characteristics which have previously been accorded discretionary function protection.

1. The Circuit Court's Methodology Does Not Comport With This Court's Treatment of the Discretionary Function Exception and Creates An Unjustified Analytical Bias Against FTCA Claimants

28 U.S.C. § 2674 provides: The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2680 provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to–
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Four years after the 79th Congress passed the FTCA as part of the 1946 Legislative Reorganization Act, the Supreme Court declared in *Feres v. United States*, 340 U.S. 135, 139-40, 71 S. Ct. 153, 95 L. Ed. 152 (1950) that the FTCA:

> . . . marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit. . . . As the Federal Government expanded its activities, its agents caused a multiplying number of remediless wrongs – wrongs which would have been actionable if

> inflicted by an individual or a corporation but remediless solely because their perpetrator was an officer or employee of the Government. . . .

Similarly, in *Rayonier, Inc. v. United States*, 352 U.S. 315, 319, 77 S. Ct. 374, 1 L. Ed. 2d 354 (1957), the Supreme Court noted that:

> . . . the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability.

Moreover, as Judge Holtzoff observed, the exceptions themselves ". . . should be narrowly construed." *McNamara v. United States*, 199 F. Supp. 879, 881 (D.D.C. 1961). Further,

> There is a problem . . . with interpreting the term 'function' too broadly. An overly broad interpretation would lead the discretionary function exception to shield from liability many official actions that violate statutory or regulatory prescriptions or that, though discretionary, are not susceptible to public policy considerations.

Seamon, R.H., Causation And the Discretionary Function Exception To The Federal Tort Claims Act, 30 UC Davis LR 691, at n.243 (1997).

Necessarily, therefore, in construing the discretionary function exception, the court must accord to the waiver an expansive construction, while according a narrow construction to the exception. Following those guideposts, the discretionary function can only be successfully invoked where the challenged conduct involves an element of judgment, and where that judgment is grounded in social, economic or political policy – that is, the exception, properly construed, protects only governmental actions and considerations based on considerations of public policy. *Gaubert, supra*, at 322-23, 1273, *Berkovitz, supra*, at 536-37, 1959.

It is, of course, true that this Court's historical approach to the development of a bright line of demarcation for discretionary function analysis has been occasionally perilous. The Supreme Court's treatment of the exception has not

followed "... a straight line ..." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 811, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984). Various commentators have extended that observation through *Berkovitz* and *Gaubert*. *See Peterson, BA, and Van Der Weide, ME, Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 Notre Dame L.R. 447 (1997), and *see Fishback, DS and Killefer, G The Discretionary Function Exception To The Federal Tort Claims Act: Dalehite*[7] *to Varig to Berkovitz*, 25 Idaho L.R. 291 (1989).

Examination of the nature and the extent of the judgment attendant to each of the particular actions in issue, has, however, been an analytical constant. In *Gaubert*, this Court examined in detail "... seven instances or kinds of objectionable official ..." conduct. *Gaubert, supra*, at 327-31, 1276-78.

Justice Scalia's concurrence in part and concurrence in the judgment clearly described his understanding of the methodology used by the Court. He wrote: "... I write separately because I do not think it necessary to analyze individually each of the particular actions challenged by Gaubert, nor do I think an individualized analysis necessarily leads to the results the Court obtains." *Id.*, at 334, 1280.

Justice Scalia's concurrence was not an invitation to substitute for "item-by-item" analysis, *id.*, at 339, 1282, the bundling and up-labelling mechanism fashioned by the trial court, and affirmed by the Circuit Court, in this case. Instead, Justice Scalia favored an approach unique to the facts in *Gaubert* and only "slightly different" from individualized analysis. *Id.*, at 338, 1282. Noting that federal officials only recommended the challenged actions, under threat of bank seizure, he concluded that the government conduct to be tested was the seizure and the operation of a bank, and that the recommendations were the announced guidelines pursuant to which the government would exercise its discretionary function.

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7. *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953) was this Court's first review of the exception. *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955), and *Rayonier, supra*, did not directly address the exception. *Varig, Berkovitz* and *Gaubert* followed.

No similar detour was available to, or pursued by, the trial court or the Circuit Court in the case at bar, nor this Court in the cases which paved the way for *Gaubert*. Instead, as in *Gaubert*, the Court conducted an individualized analysis.

In *Dalehite, supra*, this Court analyzed in detail "four specific acts of manufacture" of a fertilizer which exploded in shipment, *Dalehite, supra*, at 39, 969, including "bagging temperature," "bagging type," labeling and coating, and concluded that each was "the product of an exercise of judgment, requiring consideration of a vast spectrum of factors. . . ." *Id.*, at 40, 970.

In *Indian Towing*, the government conceded the inapplicability of the discretionary function exception to the

> specific acts of negligence relied on . . . (:) failure to check the battery and sun relay system which (lighthouse) light; the failure . . . to make a proper examination of the connections . . . ; the failure to check the light between September 7 and October 1 . . . ; and the failure to repair the light or give warning that the light was not operating.

Id., at 62, 123. Moreover, the Court rejected as unworkable an "end-objective" governmental activity test, *id.*, at 67, 125, readily-comparable to the Circuit Court's bundling methodology in this case, and underscored the distinctions between the protected decision to undertake a lighthouse service in the first place, and the actionable due care applicable to the light's maintenance, and the failure to warn that it was not functioning.

In *Varig*, this Court analyzed in detail the FAA's system of aircraft compliance review and spot-checking before concluding that the administratively-designed system was the product of the plainest of discretionary functions: "the Government acting in its role as regulator." *Varig, supra*, at 814, 2764.

Finally, in *Berkovitz* this Court, as in *Varig* ". . . focusing . . . on the particular nature of the regulatory conduct at issue," *Berkovitz, supra*, at 539, 1960, remanded to determine whether "officials appropriately exercise policy judgment in determining that a vaccine product complies with the relevant

safety standards," *id.*, at 545, 1963, notwithstanding that the criteria themselves were immune.

Pursuant to § 2674, and in conformity with the individualized detail evident in *Gaubert*, *Berkovitz*, *Varig*, *Indian Towing*, and *Dalehiete*, the Petitioners provided uncontroverted evidence of 21 discrete failures by Headquarters and its contractor. Those actionable failures included the painfully-mundane: for example, the failure to fix or replace a broken pin in the outdated drop-bar; the failure to keep a simple promise to the RSO to check for alternatives; the purposeless mischaracterization of the nature of a post visit; the failure to send a report to the post; the failure to timely send a second report to the post; and the failure to correct the post's misimpression that it had exhausted all available remedies. As well, the record below established actionable failures in information delivery, training and supervision. The uncontroverted declaration of petitioners' security expert was unequivocal:

> 16. . . . DS and UIIS failed to meet the standard of care applicable to the provision of security to the Embassy. ...[T]hose failures . . . took place . . . at a non-discretionary level. . . .
>
> 18. At the Embassy, several physical security deficiencies led to the decision to attack the Embassy, and the success of that attack. For example:
>
> (a) a broken and primitive drop-bar provided no deterrence in front of the metal gate at the top of the ramp in the rear parking lot.
>
> (b) no impediments were in place at the exit ramp to the rear parking lot.
>
> (c) no effective vehicle barriers were in place at the rear parking lot.
>
> (d) the rear parking lot was a "soft" target which invited attack. It offered no deterrence.
>
> (e) no effective local guard presence was available or visible at the rear parking lot.
>
> (f) . . . the local guards stationed at the rear parking lot on the day of the attack were untrained and inexperienced. . . .

(g) DS headquarters personnel never advised the RSO or ARSO of the availability or the existence of surveillance detection programs.

(h) The GEMS system was not delivered, or replaced. . . .

28. Several simple, low-cost solutions were available.

29. . . . [N]o response was transmitted to the Embassy even though the physical security enhancements information was readily available to DS headquarters personnel and its transmission would have been a simple matter.

31. DS headquarters personnel repeated these failures through August 1998. Their delay in the transmission of the report for the June 1998 inspection was in my opinion likely the result only of bureaucratic or administrative neglect or negligence. Timely transmission of that report would have alerted the Embassy to the significant deficiencies in the local guard force. The report also carelessly failed to include the promised response with regard to the rear parking lot.

32. The failures which allowed the attack to be successful were the result of bureaucratic failures by DS headquarters personnel. . . .

The Circuit Court, however, did not analyze individually each of the particular actions challenged by Petitioners. Instead, as the Circuit Court wrote:

> The district court helpfully distilled these allegations into six categories: 1) a failure to provide guidance and advice on improving security at the Embassy, 2) a failure to provide security equipment to the Embassy, 3) a failure to train adequately Embassy personnel and contractors to deal with various security threats, 4) a failure to warn adequately Embassy personnel, and others, of potential terrorist threats, 5) an improper classification of the level of security risk at the Embassy, or 6) falsely leading Embassy

> personnel to believe that security analyses had been conducted or would be conducted. . . . The district court concluded that all six categories were barred by the second step of the discretionary function test . . . As the district court explained, "[d]ecisions regarding how much safety equipment should be provided to a particular embassy, how much training should be given to guards and embassy employees, and the amount of security-related guidance that should be provided necessarily entails balancing competing demands for funds and resources." . . . "Each individual embassy's need for security," the district court noted: must be balanced against the need perceived at other embassies, and the need for security must be balanced against the need for alternative projects that could consume scarce resources. Moreover, each of Defendant's decisions regarding security involved balancing potential inconvenience to State Department employees against the perceived security gains that would result from a safety measure. (Internal citations omitted). At 66.

The Circuit Court adopted the trial court's categorizations, as well as its conclusion that "all six *categories* were barred by the second step[8] of the discretionary function test. (emphasis added)" *Id.*, at 67. By bundling individually asserted acts of garden variety negligence, so that those individual acts could be uplabelled in broader terms necessarily more conducive to a finding or conclusion of discretionary judgment, the Circuit Court abandoned this Court's 50-year-long approach to discretionary function analysis, and, in so doing, ensured the unwarranted restriction of FTCA claims.

One need not strain to design or conjure a discretion-imbued category into which lighthouse repair could have been eased in *Indian Towing*, or into which safety standards compliance for a vaccine product could have been consigned

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8. The first step, the existence of a mandatory directive precluding discretion, *Gaubert*, *supra*, at 322, 1273, is not the subject of this Petition.

in *Berkovitz*. Bundling and up-labelling of the sort used by the Circuit Court would have eliminated the need for any of the exhaustive and individualized analysis undertaken by the *Dalehite*, *Varig* and *Gaubert* courts.

The item-by-item approach is not an outmoded methodology filling an analytical vacuum until a simpler, easier method of resolving issues with a thorny history could be devised. It is fundamental to the ability of an FTCA claimant to test whether any judgment in issue " is of the kind that the discretionary function was designed to shield." *Gaubert*, at 322-23, 1273.

"... [T]he question of what 'really' caused the plaintiff's injuries for purposes of applying the discretionary function exception is a potentially dispositive threshold issue.... First, a court must ask upon what conduct the claim is based...." *Seamon, supra*, at 695-96, 701-02. The nature and the extent of the judgment attendant to that conduct is readily-susceptible to judicial exploration, and application to the standards enunciated in *Berkovitz* and *Gaubert*. There is no reason for the injection into that process of an artificial bundling and uplabelling stage which would be contentious, penultimately pedantic, and, ultimately, exclusionary of claims arising out of particular acts of garden variety negligence which, by their own nature, warrant relief under the FTCA.

2. The Circuit Court's Blanket Immunization of Conduct Invoking "Security" Exceeds the Language of the Statute

In the two paragraphs which are the heart of the Circuit Court's disposition of the discretionary function, the Circuit Court uses the word "security" nine times. Though the Circuit Court opinion contains no simple, direct language carving from the FTCA all security-related actions and decisions, the subtlety of the opinion is insufficient reason to forestall review of a construction which could lead to significant erosion of the statute itself.

This Court has not had occasion to consider whether the government's security-related activities should be accorded uniquely-comprehensive protection from civil liability under the FTCA. Faced, however, with government conduct in arenas

which, at the time, carried with them the same seriousness, the Court never contemplated the propriety of a blanket immunity untethered to the discretionary function formulations with which it has wrestled since the passage of the statute. The reliability of vaccines in 1988, *see Berkovitz, supra*, the safety of aircraft in 1984, *see Varig, supra*, the reliability of public works such as lighthouses in 1955, *see Indian Towing, supra*, and the transportation of inherently dangerous material in 1953, *see Dalehite, supra*, could undoubtedly have produced champions of their place at the pinnacle of government responsibility and public concern. Indeed, commentators have declined to propose exceptional protections to all matters related to national defense. "The statutory mission of the Department of Defense may be to protect the nation's security, but not every action of every Defense Department employee is taken with that goal in mind." *Peterson, BA*, and *Van Der Weide, supra*, at 3-4. This Court should, therefore, guard against jurisdictional erosions threatened by serious, imminent but necessarily transitory challenges to the national well-being, not merely because the interests of the injured would be circumscribed, but because, over the longer term, the national well-being is advanced by judicial scrutiny of such government failures.

The dissent of Justices Jackson, Black and Frankfurter to the now-long-abandoned formulations of *Dalehite, supra*, has fundamental application to this Court's choice of direction:

> This is one of those cases that a judge is likely to leave by the same door through which he enters. As we have been told by a master of our craft, 'Some theory of liability, some philosophy of the end to be served by tightening or enlarging the circle of rights and remedies, is at the root of any decision in novel situations when analogies are equivocal and precedents are silent.' . . .
>
> Until recently, the influence of the Federal Government has been exerted in the field of tort law to tighten liability and liberalize remedies. . . . But, when the Government is brought into court as a tort defendant, the very proper zeal of its

> lawyers to win their case and the less commendable zeal of officials involved to conceal or minimize their carelessness militate against this trend. The Government, as a defendant, can exert an unctuous persuasiveness because it can clothe official carelessness with a public interest. Hence, one of the unanticipated consequences of the Tort Claims Act has been to throw the weight of government influence on the side of lax standards of care in the negligence cases which it defends. At 49-50, 975.

Immunization of security-related decisions and conduct will, eventually, and tragically, produce the same consequences. A statute that was designed "to establish novel and unprecedented governmental liability," *Rayonier, supra,* at 319, should not instead be constrained by novel and, at least since the passage of the FTCA, unprecedented governmental immunity.

3. The Circuit Court's Categories Have Either Been Treated By other Circuits As Outside the Protection of the Discretionary Function Exception Or They Lack Any Characteristics Which Have Previously Been Accorded Discretionary Function Protection

Even assuming *arguendo* that the applicability of the discretionary function is determined by analyzing the nature and the extent of the judgment attendant to the six categorizations adopted by the Circuit Court, rather than the individual allegations, the Circuit Court's disposition of those categorizations conflicts with treatment accorded similar allegations[9] in other Circuits or, in one instance, lacks any characteristics which have previously been accorded discretionary function protection.

Failure to provide guidance and advice on improving security at the Embassy

Headquarters claims, such as the claims in this case, "... typically involve *allegations of negligent guidance* in an office

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9. Petitioners do not address in this Petition the Circuit Court's "improper classification of the level of security risk at the Embassy" category.

within the United States of employees who cause damage while in a foreign country, or of activities which took place within a foreign country" (emphasis added). *Nurse v. United States*, 229 F.3d 996 (9th Cir. 2000).

Failure to provide security equipment to the Embassy

In *Marlys Bear Medicine v. United States*, 241 F.3d 1208, 1213 (9th Cir. 2001) reversing entry of summary judgment in favor of the United States in a case arising out of government negligence in supervision and management of safety aspects of a private logging operation, the Court wrote:

> [A]ctions based on technical or scientific standards are not the kind of judgments meant to be protected from liability by the discretionary function exception.
>
> . . .
>
> A failure to effectuate policy choices already made will not be protected under the discretionary function exception.
>
> . . .
>
> Once the government has undertaken responsibility for the safety of a project, the execution of that responsibility is not subject to the discretionary function exception.
>
> . . .
>
> A failure to adhere to accepted professional standards is not 'susceptible to policy analysis'. . . .
>
> . . .
>
> [F]ailure to require safety measures or training was not a policy judgment that Congress intended to protect from FTCA liability." At 1215-1217

Failure to train adequately Embassy personnel and contractors to deal with various security threats

In *Couzado v. United States*, 105 F.3d 1389, 1395-96 (11th Cir. 1997) the Eleventh Circuit, upholding a determination that the foreign country exception did not apply, ruled: "The plaintiffs urge that a 'headquarters' claim exception exists in §2680(k) jurisprudence . . . This claim is achieved on proof that a *negligent failure to warn, instruct or train* occurred in the United States (emphasis added)." And *see Marlys, supra.*

Failure to warn adequately Embassy personnel, and others, of potential terrorist threats

The discretionary function exception does not eviscerate the government's obligation to warn, or disclose to, the public, particularly where the safety of others is involved. *See Summers v. United States*, 905 F.2d 1212, 1215 (9th Cir. 1990), and *see ARA Leisure Services v. United States*, 831 F.2d 193, 195 (9th Cir. 1987). The discretionary function exception is not and has never been regarded as an absolute bar to claims based on the failure to warn or disclose. *See* Shafer, RP, *Liability Of The United States For Failure To Warn Of Danger Or Hazard Resulting From Government Act Or Omission As Affected By "Discretionary Function Or Duty" Exception To Federal Tort Claims Act 28 U.S.C.A. § 2680(a), 65 ALR Fed. 358.*

While complicated by each Court's pre-*Gaubert* insistence on proof of actual, rather than hypothetical, policy consideration, the Second Circuit in *Andrulonis v. United States*, 924 F.2d 1210 (2d Cir. 1991), *vacated*, 502 U.S. 801 (1991), previous decision reinstated, 952 F.2d 652 (2d Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992) and the First Circuit in *Dube v. Pittsburgh Corning*, 870 F.2d 790 (1st Cir. 1989) imposed clear duty to warn of hazardous conditions. And *see Cestonaro v. United States*, 211 F.3d 749 (3d Cir. 2000).

Falsely leading Embassy personnel to believe that security analyses had been conducted or would be conducted.

Headquarters' persistent failure to communicate accurately with its colleagues at Post – either with regard to mischaracterizing the purpose of its inspections, promising assistance that never arrived, the immediacy in Nairobi of the bin Laden threat or the inadequacies of the local guards or their management[10] – lacks any characteristics which have previously been accorded discretionary function protection. Though there does not appear to be a Circuit Court opinion addressing the social, economic or political considerations

10. The United States had obtained a sealed indictment against Bin Laden on June 8, 1998. The indictment was obtained on the basis of information obtained from Bin Laden's Nairobi cell.

Moreover, prior to the attack, both the Department of Labor and the Department of Justice were familiar with significant misconduct in the United States by the security contractor at the Embassy.

which inform a government employee's conscious election to dissemble, or his failure to accurately convey important information, to colleagues who rely on the information, the unexplained adoption by the Circuit Court of a disposition which protects the government from the consequences to others of that misconduct must attract review in order to avoid confusion about the acceptability of those practices.

B. The Disposition of the Claims In This Case Is of Substantial Intrinsic, National and International Consequence

The intrinsic consequence of the Circuit Court's decision – that is, the impact of the decision to bar from judicial remedies hundreds of Kenyan families who suffered the death of a family member, and thousands of Kenyans who were injured – should be free from contravention. The national consequence, both in the concomitant immunization of the United States from the claims in this case, and the narrowing of avenues of relief for future claimants under the FTCA, as is discussed in the preceding subsection, is equally undeniable.

It is, however, in the international arena that the impact of the Circuit Court's exclusion of Petitioners' claims will reverberate. Called by many in Kenya the "law suit of the century," *see, e.g., The (Kenyan) Lawyer* (April 1999), and the subject of numerous media reports in East Africa and in Europe over its duration, the pendency of the claim in an American court was an antidote to the observation in 1999 by one East African newspaper that "Kenyans were amazed at the callous disregard for Kenyan lives by American officials."

The import of the 1998 attack on American international concerns has not faded. Only two days ago, the Washington Post described comments by President Bush at a state dinner as follows:

> Today, we stand together against the forces of terror and in the defense of human dignity, Bush said in his toast. "We both understand the danger and cost of terrorism. It has brought damage to both our economies and grief to both our nations."
>
> Kenya was the site of the 1998 attack on the U.S. Embassy in Nairobi, and the bombing last November of an Israeli-owned hotel in Mombassa.

On August 7, 2002, Walter Kansteiner, DOS Assistant Secretary for African Affairs, released the following statement:

> I hope that, as the 9/11 anniversary draws closer, we will remember another date that will live in infamy: August 7, 1998. The men, women and children – Americans, Kenyans and Tanzanians –who were murdered or injured that day were among the first casualties in the Global War on Terrorism. . . .
>
> Al-Qaida destroyed two embassies 4 years ago, but they did not destroy the ties that bind the American, Kenyan and Tanzanian people together. In fact, they strengthened them. . . . The United States soon will open new embassy buildings in Dar es Salaam and Nairobi. Those buildings will serve as tangible symbols that the comradeship the bombings forged between the American, Kenyan and Tanzanian peoples will never be allowed to wane.

Grant of the Petition would be consistent with American expressions of our recognition of the gravity of the harm inflicted on our Kenyan friends and allies during the crossfire in our War on Terrorism, and of our willingness to address, in our most elevated venue, any responsibility we may have for the deep losses they sustained.

II. The Circuit Court's Misapplication of the Foreign Country Exception Is in Principled Conflict With Other Circuits, and Misconstrues the Law In a Case of Substantial Intrinsic, National and International Consequence

Local guard programs serve as a substitute for insufficiencies in host country protection. Since 1995, they have been managed by DS. UIIS was the contractor hired by Respondent to provide local guard services at the Nairobi Embassy. Petitioners alleged that UIIS was negligent both in the months leading up to the attack, and during the attack.

Respondent is generally liable for the negligence of its contractors unless the independent contractor exception

applies. *See* 28 U.S.C. § 2671, and *see Logue v. United States*, 412 U.S. 521, 93 S. Ct. 2215, 37 L. Ed. 2d 121 (1973) and *United States v. Orleans*, 425 U.S. 807, 96 S. Ct. 1971, 48 L. Ed. 2d 390 (1976).

The Circuit Court addressed LGP claims as follows:

> To be sure, appellants presented evidence that supervision of the UIIS contract amounted to a "full time job for one [Assistant Regional Security Officer]." . . . Although this may well constitute the sort of day-to-day supervision falling outside the independent contractor exception, Assistant Regional Security Officers are located overseas – in this case, in Nairobi – and the FTCA's sovereign immunity waiver does not extend to acts or omissions arising in territory subject to the sovereign authority of another nation. *See 28 U.S.C. § 2680(k); see also United States v. Spelar, 338 U.S. 217, 221, 70 S.Ct. 10, 12, 94 L.Ed. 3 (1949)* (purpose of foreign country exception is to avoid having another country's law define the scope of the federal government's tort liability). Moreover, to the extent that appellants allege negligent supervision of local guards by State Department employees located in the United States, those allegations are, for the reasons given above, barred by the discretionary function exception.[11]

The Circuit Court, however, made no attempt to address "headquarters claims", explicitly recognized by the Ninth, Eleventh and District of Columbia Circuits." *See Leaf v. United States*, 588 F.2d 733 (9th Cir. 1978), *Couzado, supra*, and *Nurse, supra*, and *see Beattie v. United States*, 244 U.S. App. D.C. 70, 756 F.2d 91 (1984). Indeed, then – Judge Scalia acknowledged that "few such (headquarters) suits will be able to be dismissed at the jurisdictional threshold." *Beattie, supra*, at 119.

> The allowance of headquarters claims should . . . be broadened, rather than narrowed. . . . Courts should thus give claimants a great deal of leeway in presenting their cases. . . ."

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11. Petitioners' adopt herein their discretionary function response in Section I.

Comment, *Away From Justice And Fairness: The Foreign Country Exception To The Federal Tort Claims Act*, 22 Loy. L.A. L.R. 603, 631 (Spring 1989).

The record before the court was more than adequate to trigger application of a headquarters claim analysis.

Headquarters developed the LGP operating manual, provided training to RSOs regarding local guard contracts, approved and provided LGP equipment, and, most significantly, developed and provided LGF training. In addition, Headquarters designed the template for all LGF contracts, forms and reviews, and including the contract at issue in this case. Headquarters developed the General Orders which defined LGF performance, as well as the statement of work, the deduction schedule, and United States and contractor furnished equipment requirements.

Headquarters, which instructed posts to refrain from making their own constructive changes to LGF contracts, demanded that the Nairobi Post keep Headquarters informed of the LGF contract, directly addressed the effect of the contractor's threat of bankruptcy, and regularly reviewed the contractor's performance under the contract. The LGF bridge contract was signed in Washington .

Headquarters revised RSO draft correspondence regarding performance under the LGF in Nairobi, maintained and updated an LGF database handled all payments under the contract, and settled a certified claim by the contractor. Consistent with Headquarters requirements that all LGF questions be directed to Headquarters, Post regularly sought guidance from Headquarters on its LGF contract.

In short, Headquarters provided the training, guidance, management and oversight which should have led to review of a headquarters claim as it related to the negligence of the local guards. The Circuit Court's failure to do so places it squarely in conflict with other Circuits.

Even assuming *arguendo* that Headquarters had no responsibility for the local guards, application of the foreign country exception should have been precluded by the periodic presence in the United States during the time period in issue of the RSO's.

RSO Hartnett-Kelly conceded her likely presence in the United States during that period. RSOs attended conferences conducted in the United States. Both the ARSO and Ambassador Bushnell were in the United States during Hartnett-Kelly's tenure.

Respondent conceded that RSOs are considered on duty 24 hours a day. As Petitioner's expert stated in his declaration: "This status is accorded to all Federal investigators who are part of the job series to which RSO Hartnett-Kelly was assigned. Special agents are subject to assignment to any location at any time, and because of this status they receive special law enforcement incentive pay."

Accordingly, training or supervisory omissions by Post employees continued even during their presence in the United States. The Circuit Court, however, did not address that issue.

Neither the language nor the purpose of the foreign country exception supports the conclusion reached by the Circuit Court. Congress' concern – to avoid having another country's law define the scope of the federal government's tort liability – would have been addressed by the simplest and least controversial of decisions – the application of District of Columbia law by the District of Columbia trial court.

To avoid confusion in the application of headquarters claims, therefore, this Court should grant the Petition.[12]

III. The Circuit Court's Residuary Affirmance of the Trial Court's Erroneous Construction of the Principles of "Prolonged Detention" and "Systematic Discrimination" Under Fed. R. Civ. P 12(b)(6) Is in Principled Conflict With Other Circuits, and Misconstrues the Decisions of this Court In a Case of Substantial Intrinsic, National and International Consequence

The Circuit Court's residuary embrace, without additional comment, App. 4a, of the trial court's disposition of Petitioners' Count Three claims of violation of international law, App. 43a, is in principled conflict with the construction by other circuits of claims of "prolonged detention," and "systematic

12. Petitioners adopt from the previous section the international significance of the Circuit Court's disposition of the LGP negligence claims.

discrimination," and misconstrues this Court's treatment of "prolonged detention" claims.

Petitioners alleged that the United States prevented Kenyan rescue operations; and, discriminated against the injured Kenyans by directing limited medical resources to Americans, while depriving Kenyans of those resources. Stated otherwise, Petitioners sought relief because the United States consciously imprisoned, and subjected to inhumane treatment, the injured Kenyans, solely on the basis of their nationality and race.

The International Convention on Civil and Political Rights ("ICCPR"), App. 56a, ratified 138 Cong. Rec. S4781-84 (Apr. 2, 1992), precludes "prolonged arbitrary detention" and "systematic racial discrimination." *See* Restatement (3d) of Foreign Relations Law § 702(e), and *see Princz v. Federal Republic of Germany*, 26 F.3d 1116, 1174 (D.C. Cir. 1974), and *see Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001). *See* also *Committee of US Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988).

"In contemporary international law, broadly ratified multilateral treaties are more likely than a series of bilateral treaties to generate the argument that treaty rules have become customary law. . . ." Steiner, HJ and Alston, P. *International Human Rights In Context* (Clarendon Press, Oxford 1996) at p.38. And *see* Restatement (3d) of the Foreign Relations Law of the United States § 102 (1986).

"Cases arising under international law or international agreements of the United States are within the Judicial Power of the United States and, subject to constitutional and statutory limitations and requirements of justiciability, are within the jurisdiction of the federal courts." Restatement (3d) of Foreign Relations Law of the United States § 111 (1986). "Federal courts jurisdiction over cases involving international law is clear." *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980), and *see* Charles A. Wright, *et al.*, 13B Federal Practice and Procedure § 3585 at nn. 6-13 and accompanying text (1988 ed.) (customary international law is a part of federal common law for purposes of federal question jurisdiction).

Neither the trial court, nor, as a consequence, the Circuit Court, appears to have disputed the jurisdiction of the trial court over the customary international law claims, as those customs are defined by the ICCPR. Rather, the trial court concluded, under Fed. R. Civ. P. 12(b)(6), that Petitioners failed to allege facts sufficient to satisfy the terms "prolonged," "arbitrary," or "systematic." App. 44a. That determination incorrectly construes decisions of this Court, and conflicts in principle with decisions of other Circuit Courts.

A. The Circuit Court's Disposition of the Claims of "Prolonged Detention" Misconstrues This Court's Treatment of that Issue In Principles and Conflicts With Decisions In Other Circuits

"Prolonged detention" has been applied to a 16 hour detention, *United States v. Montoya de Hernandez*, 473 U.S. 531, 545, 105 S. Ct. 3304, 3312 (1985) (Stevens, concurring), and to an unusual traffic stop. *Pennsylvania v. Bruder*, 488 U.S. 9, 11, 109 S. Ct. 205, 206 (1988). And *see Alvarez-Machain v. United States*, 266 F.3d 1045, 1053 (9th Cir. 2001) (emphasizing effect on victim, not duration, ruled that detention of under 24 hours was arbitrary and violated the law of nations). There is, thus, no support for the trial court's determination that the complaint failed to satisfy the lenient pleading standard of 12(b)(6).

Clearly, that decision both misconstrued in principle this Court's treatment of the issue, and conflicted with decisions from other circuits.

B. Assertions of "Prolonged Detention" Are Recurring And Important Issues in Current Federal Litigation[13]

The impact of the District of Columbia's erroneous decision extends well beyond its effect on Petitioners. Imprecise judicial construction of the meaning of "prolonged detention" threatens confusion in both civil and criminal contexts which are the subject of repeated and contemporaneous federal litigation.

In *Cherrington v. Skeeter*, 2003 WL 22187734 (6th Cir. 2003), the Sixth Circuit reversed grant of summary judgment against

13. The intrinsic and international impact of the Circuit Court's decision, as discussed in the preceding sections, is equally applicable to the international law-based claims.

a plaintiff's Fourth Amendment 42 U.S.C. § 1983 claim of prolonged detention. And *see United States v. Vite Espinoza*, 342 F.3d 462, 473 (6th Cir. 2003) (discussing effect of "prolonged detention" during search, and observing that the court must assess "the scope and the nature of the restraints," and not merely "the length of the detention").

Similarly, in *Williams v. Kaufman County*, 2003 WL 21962582 (5th Cir. 2003), the Fifth Circuit concluded that a three-hour detention was prolonged and illegal, though subject to qualified immunity. And *see United States v. Brigham*, 343 F.3d 490 (5th Cir. 2003) (18 minute detention during traffic stop was prolonged and illegal).

Indeed, the Third Circuit, in *Pikel v. Garrett*, 55 Fed. Appx. 29 (3d Cir 2002) (unpublished) noted the "relative uncertainty in the law" in a § 1983 claim based on the prolonged three-and-a-half hour detention of employees during a search of business premises. At 32.

The instant petition should be granted in order to forestall confusion among the Circuits and to clarify, establish or reject the imposition of minimal durations for claims of prolonged detention.

C. The Circuit Court's Disposition of the Claims of "Systematic Discrimination" Conflicts With Decisions In Other Circuits

"Systematic discrimination" is a ". . . pattern or practice which results in discrimination." *Huguley v. General Motors Corp.*, 52 F.3d. 1364, 1370 (6th Cir. 1995). "The talk in some cases about systematic discrimination is only a way of indicating that in order to give rise to a constitutional grievance a departure from a norm must be rooted in design and not derive merely from error or fallible judgment." *Batra v. Board of Regents of University of University of Nebraska*, 79 F.3d 717, 721 (8th Cir. 1996). Thus, as the Eighth Circuit makes clear, and contrary to the *sub silencio* determination of the District of Columbia Circuit, the fact that the complaint alleges systematic discrimination in the course of a single event cannot be dispositive as a matter of law of the sufficiency of the complaint. Rather, the court must look to the existence of a "design" at the root of the discrimination. Because the

complaint alleged intent, the dismissal of Petitioner's international law claims conflicted in principle with the Eighth Circuit's treatment of systematic discrimination claims.

D. Assertions of "Systematic Discrimination" Are Recurring And Important Issues in Current Federal Litigation

Imprecise judicial construction of the meaning of "systematic discrimination" threatens confusion in civil and criminal contexts which are the subject of repeated and contemporaneous federal litigation. Claims of "systematic discrimination" regularly arise in the course of the resolution of a variety of issues in federal litigation, *see Desi's Pizza Inc. v. City of Wilkes-Barre*, 321 F.3d 411 (3d Cir. 2003) (whether systematic discrimination in law enforcement violates the Equal Protection Clause), *McKay v. United States Department of Transportation*, 340 F.3d 695 (8th Cir. 2003) (age discrimination in employment), and *United States v. Marino*, 277 F.3d 11 (1st Cir. 2003) (whether criminal defendant met threshold requirement of systematic discrimination for *Batson* challenge).

The instant petition should be granted in order to forestall confusion among the Circuits and to clarify, establish or reject the imposition of minimal scope or duration requirements for claims of systematic discrimination.

CONCLUSION

On the basis of the foregoing, a writ of certiorari should issue to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED JULY 11, 2003

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 13, 2003 Decided July 11, 2003

No. 02-5252

MERANIA MURINGU MACHARIA, ET AL.,

APPELLANTS,

v.

UNITED STATES OF AMERICA,

APPELLEE.

Before: GINSBURG, *Chief Judge*, and ROGERS and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: Appellants, a prospective class of more than 5,000 Kenyan citizens and businesses injured in the 1998 bombing of the United States Embassy in Nairobi, Kenya, sued the United States under the Federal Tort Claims Act alleging that the government negligently failed to secure the Embassy and to warn of a potential terrorist attack. Following limited jurisdictional discovery, the district court dismissed the complaint, finding that the discretionary

function, foreign country, and independent contractor exceptions to the Federal Tort Claims Act's waiver of sovereign immunity bar appellants' claims. We affirm in all respects.

I.

At approximately 10:30 on the morning of August 7, 1998, an explosives-laden truck dispatched by the al Qaeda terrorist network approached the entrance to the rear parking lot of the United States Embassy in Nairobi, Kenya. An embassy guard, a Kenyan employed by UIIS, a security company working under contract with the State Department, refused to open the Embassy gate. Blocked from entering the compound, one of the two terrorists began shooting while the other threw a flash grenade at another guard. Unarmed and unable to notify the Embassy's detachment of United States Marines either by telephone or radio, the guards ran for cover. Although apparently still off-premises, the terrorists detonated their explosives, causing massive internal damage to the Embassy, killing forty-four Embassy employees and approximately 200 Kenyan citizens, injuring some 4,000 individuals, and causing the collapse of an adjacent building. Approximately nine minutes later, another al Qaeda terrorist detonated an explosives-laden truck some thirty-five feet from the outer wall of the United States Embassy in Dar Es Salaam, Tanzania. That attack killed twelve people and injured eighty-five.

Appellants, all Kenyan citizens and businesses injured in the Nairobi bombing, filed suit against the United States in the U.S. District Court for the District of Columbia alleging

that government actions and inactions led to the bombing and exacerbated appellants' injuries. Brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.*, counts I and II of the complaint allege that the United States Embassy was inherently dangerous; that State Department employees knew or should have known about a likely attack on the Embassy and that despite this knowledge they failed to warn their superiors, the Embassy, and Kenyan citizens; that the State Department failed to provide properly trained security personnel to the Embassy and to take necessary security precautions to prevent an attack; and that as a result of these shortcomings, the Embassy had become a private and public nuisance. Counts I and II also seek to hold the United States liable for the negligence of the UIIS guards. Count III alleges that the government's security failures violated customary international law, the Kenyan Constitution, and the International Covenant on Civil and Political Rights (ICCPR). Count IV seeks formation of a constructive trust to hold any assets or funds seized by the United States from Osama bin Laden and al Qaeda for the benefit of plaintiffs and prospective class members.

Invoking the discretionary function and foreign country exceptions to the FTCA's limited waiver of sovereign immunity, 28 U.S.C. § 2680(a), (k), the government moved to dismiss. Before ruling on the government's motion, the district court allowed plaintiffs three months of jurisdictional discovery. *See Macharia v. United States*, No. 99-3274 (D.D.C. Mar. 26, 2001). During discovery, the government objected to plaintiffs' efforts to obtain information from any agency other than the State Department. The government also objected to any discovery on the merits. A magistrate judge

sustained both objections, and the district court denied plaintiffs' motion for reconsideration. *See Macharia v. United States*, No. 99-3274 (D.D.C. Dec. 17, 2001).

Following completion of jurisdictional discovery, the district court dismissed the complaint. *Macharia v. United States*, 238 F. Supp. 2d 13 (D.D.C. 2002). Rather than "apply the heightened requirements of [Federal Rule of Civil Procedure] 12(b)(6) and treat all factual allegations—including those related to jurisdiction—in the complaint as true," *id.* at 21 (internal quotation marks omitted), the court treated the government's jurisdictional arguments as a "factual challenge," *id.* at 20, under Federal Rule of Civil Procedure 12(b)(1), and required plaintiffs to "demonstrate" "through testimony and affidavits" that the "case is properly before the court," *id.* at 21. Observing that plaintiffs "were afforded three months of discovery on the jurisdictional question," *id.*, the court rejected plaintiffs' contention that it "should not dismiss the action pursuant to Rule 12(b)(1) because [they] have not had the opportunity to conduct sufficient jurisdictional discovery in this case," *id.* With respect to most allegations contained in counts I and II, the court found that "[t]he decisions made by [the United States] regarding the security of the Embassy and warnings of possible threats are clearly discretionary in nature and grounded in policy and therefore[ ] do not fall within the FTCA's waiver of sovereign immunity." *Id.* at 26. The district court dismissed all claims based on the alleged negligence of the UIIS guards under the foreign country and independent contractor exceptions to the FTCA. *Id.* at 26-28. As to count III, the court held that sovereign immunity bars plaintiffs' Kenyan Constitution and ICCPR claims, and that plaintiffs

had failed to allege a claim under customary international law. *Id.* at 28-31. Having dismissed plaintiffs' substantive claims, the district court dismissed count IV, explaining that "a constructive trust is not an independent cause of action." *Id.* at 31.

Plaintiffs now challenge the district court's discovery rulings and its dismissal of their complaint. Our review of the district court's dismissal of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) is de novo, *see Stokes v. Cross*, 327 F.3d 1210, 1214 (D.C. Cir. 2003); we review the district court's discovery rulings for abuse of discretion, *see Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1147 (D.C. Cir. 1994).

II.

The FTCA authorizes district courts to hear suits for money damages against the United States "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government . . . if a private person . . . would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). The Act's waiver of sovereign immunity has various exceptions, however. We agree with the district court that three of those exceptions—discretionary function, foreign country, and independent contractor—bar appellants' claims under counts I and II.

Appendix A

Discretionary Function Exception

The FTCA's discretionary function exception bars claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). In *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991), the Supreme Court established a two-part test for determining whether the discretionary function exception applies in a particular case. First, because "[t]he exception covers only acts that are discretionary in nature, acts that involve an element of judgment or choice," *id.* at 322 (internal quotation marks omitted), *Gaubert's* first step requires that we determine whether any "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," *id.* If one does, "the employee has no rightful option but to adhere to the directive." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). Under *Gaubert's* second step, which applies when there is no "federal statute, regulation, or policy" and when the "challenged conduct involves an element of judgment," *id.*, the court must decide "whether th[e] judgment is of the kind that the discretionary function exception was designed to shield," *id.* "Because the purpose of the exception is to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort," the Supreme Court explained, "when properly construed, the exception protects only governmental actions and decisions based on considerations of public policy." *Gaubert*, 499 U.S. at 323 (internal quotation marks and citations omitted).

In this case, even after several months of discovery, appellants failed to establish, as *Gaubert*'s first step requires, the existence of a "federal statute, regulation, or policy" that applies to any of the government's allegedly negligent conduct, including the government's alleged failure to secure the Embassy and to warn of a potential attack. This failure is hardly surprising, for as the district court explained, "determinations about what security precautions to adopt at American embassies, and what security information to pass on, and to whom this information should be given, do not involve the mechanical application of set rules, but rather the constant exercise of judgment and discretion." *Macharia*, 238 F. Supp. 2d at 23. Indeed, the Secretary of State has authority to "develop and implement . . . policies and programs, including funding levels and standards, to provide for the security of United States Government operations of a diplomatic nature," 22 U.S.C. § 4802(a)(1), and the "Physical Security Standards" section of the State Department's Foreign Affairs Manual instructs "[p]roject managers and regional security officers . . . [to] follow all standards to the maximum extent possible," UNITED STATES DEP'T OF STATE FOREIGN AFFAIRS MANUAL, 12 FAM 314.1. The manual also directs foreign service officers to engage in a process of

> [r]isk management . . . begin[ning] with an assessment of the value of the assets, the degree of a specific type of threat, and the extent of the vulnerabilities. . . . A decision is then made as to what level of risk can be accepted and which countermeasures should be applied. Such a decision involves a cost-benefit analysis, giving decision makers the ability to weigh varying

> security risk levels against the cost of specific countermeasures.

Id., 12 FAH-6 H-511.4. In short, embassy security is vested in the discretion of State Department employees, from the Secretary to the foreign service officers at various embassies. *See Macharia*, 238 F. Supp. 2d at 23-24.

Conceding that they "did not rely on any documents" to demonstrate that a "federal statute, regulation, or policy" applied to the government's conduct, Appellants' Reply Br. at 6, appellants contend that the discretionary function exception is nevertheless inapplicable because the government failed to follow an *unwritten* federal policy. According to appellants, the Office of Diplomatic Security (DS), the office within the State Department responsible for embassy security, failed to file "trip reports" with the Embassy's Regional Security Officer following visits to the Embassy in March and June 1998, even though " '[a] team trip report would have been a normal practice.' " Appellants' Reply Br. at 6 (citing Williams Dep. at 125:19-20). DS's failure to file a trip report, appellants maintain, left the Embassy with inadequate guidance about how to improve security and to prevent al Qaeda's attack.

Even assuming an unwritten practice can satisfy the statute's requirement, appellants have failed to establish that DS had a *mandatory* obligation to file a trip report. To the contrary, although the record establishes that filing trip reports was DS's "procedure," one witness testified that "reality sometimes intercedes, and you do not have sufficient time to do something as formal as . . . a trip report." Flowers

Dep. at 51:15-17. The same witness explained that filing a trip report "would be ideal, but it could have been that the people that were team leaders . . . were immediately sent on other trips or to handle other pressing business. . . . If [the diplomatic security agent] was called away before he had a chance to write a trip report, it might be sometime before he gets to it or it could be never if this flood of work doesn't give him the opportunity to do it." *Id.* at 49:7-21. The record thus establishes only that filing trip reports was preferred, not that it was required, *i.e.*, not that it amounted to a mandatory policy.

Having failed to identify a relevant "federal statute, regulation, or policy" under *Gaubert*'s first step, appellants contend that the discretionary function exemption is inapplicable under the second step because the government's conduct was the product of simple negligence rather than social, political, or economic considerations. Specifically, appellants cite twenty-one instances of alleged government negligence, from its failure to fix a pin in the drop bar at the Embassy's rear parking lot to its failure to timely design a training program for vehicle bomb recognition and prevention that led to appellants' injuries. *See* Appellants' Br. at 25-26. The district court helpfully distilled these allegations into six categories:

> 1) a failure to provide guidance and advice on improving security at the Embassy, 2) a failure to provide security equipment to the Embassy, 3) a failure to train adequately Embassy personnel and contractors to deal with various security threats, 4) a failure to warn adequately Embassy

> personnel, and others, of potential terrorist threats, 5) an improper classification of the level of security risk at the Embassy, or 6) falsely leading Embassy personnel to believe that security analyses had been conducted or would be conducted.

Macharia, 238 F. Supp. 2d at 22. The district court concluded that all six categories were barred by the second step of the discretionary function test. *Id.* As the district court explained, "[d]ecisions regarding how much safety equipment should be provided to a particular embassy, how much training should be given to guards and embassy employees, and the amount of security-related guidance that should be provided necessarily entails balancing competing demands for funds and resources." *Macharia*, 238 F. Supp. 2d at 25. "Each individual embassy's need for security," the district court noted:

> must be balanced against the need perceived at other embassies, and the need for security must be balanced against the need for alternative projects that could consume scarce resources. Moreover, each of Defendant's decisions regarding security involved balancing potential inconvenience to State Department employees against the perceived security gains that would result from a safety measure.

Id. We have little to add to the district court's fine analysis, except to note that, as the government points out in its brief, "decisions about foreign embassies, especially their location

and structure, require agency officials to account for policy objectives, and consult and negotiate with the host country—actions that, by their very nature, affect foreign relations." Appellee's Br. at 27.

Appellants insist that "[n]othing in the record supports the notion that anyone at DS 'decided' to: make inaccurate statements, fail to keep a promise, fail to send a report, fail to send a report on time, overlook a broken pin or outdated dropbar, or fail to correct misapprehensions." Appellants' Br. at 30. Put another way, appellants maintain that *Gaubert*'s second step requires evidence that decision makers actually considered social, economic, or policy considerations. But we rejected just this argument in *Cope v. Scott*, 45 F.3d 445, 449 (D.C. Cir. 1995) (citation omitted): "What matters is not what the decisionmaker was thinking, but whether the type of decision being challenged is grounded in social, economic, or political policy. Evidence of the actual decision may be helpful in understanding whether the 'nature' of the decision implicated policy judgments, but the applicability of the exemption does not turn on whether the challenged decision involved such judgments."

Appellants' challenges to the district court's discovery orders require little discussion. They argue that the district court improperly applied a factual attack standard under Federal Rule of Civil Procedure 12(b)(1), which requires plaintiffs to demonstrate through affidavits and other testimony that the court has jurisdiction, instead of a facial attack standard under Federal Rule of Civil Procedure 12(b)(6), where the court accepts the plaintiffs' allegations as true. *See Gould Elecs., Inc. v. United States*, 220 F.3d 169,

178 (3d Cir. 2000). According to appellants, the district court's choice of a factual attack standard was error, since the court allowed discovery only regarding physical security and denied appellants a chance to conduct discovery on "threat response." Appellants' Br. at 18. In support of this allegation, appellants point out that the deponents offered by the government declined to answer any questions on the threat issue, but appellants ignore the fact that those deponents were not asked to testify on that issue. Moreover, as the government observes, "appellants refute their own argument by citing documents on threat information that appellee produced in discovery, to support their claim of failure to disseminate threat information." Appellee's Br. at 42. The district court thus properly employed a factual attack standard under Federal Rule of Civil Procedure 12(b)(1).

Nor do we detect any abuse of discretion in the district court's other discovery orders. The State Department's statutory responsibility for embassy security obviated the need for discovery in other departments and agencies. *See* 22 U.S.C. § 4802. Likewise, discovery on the merits would have been entirely irrelevant to the jurisdictional issue raised by the government's motion to dismiss. *See Ignatiev v. United States*, 238 F.3d 464, 467 (D.C. Cir. 2001) (remanding dismissal of FTCA claim for jurisdictional discovery).

Foreign Country and Independent Contractor Exceptions

Our conclusion regarding the discretionary function exception leaves only appellants' allegations of negligence by Embassy guards. According to appellants, the Kenyans

UIIS hired as Embassy guards lacked adequate training and equipment, and negligently failed to identify and stop the terrorists from detonating the bomb. We agree with the district court that the independent contractor and foreign country exceptions bar these claims.

The FTCA's waiver of sovereign immunity applies only to tortious acts undertaken by "officers or employees of any federal agency ... and persons acting on behalf of a federal agency in an official capacity." 28 U.S.C § 2671. The Act defines "federal agency" as "the executive departments [,] . . . independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States." *Id.* The Supreme Court has interpreted this language, referred to as the "independent contractor exception," to mean that a contractor's negligence may only be imputed to the United States if the contractor's "day-to-day operations are supervised by the Federal Government." *United States v. Orleans*, 425 U.S. 807, 815 (1976). "A critical element in distinguishing an agency from a contractor," the Court explained, "is the power of the Federal Government 'to control the detailed physical performance of the contractor.' " *Id.* at 814 (quoting *Logue v. United States*, 412 U.S. 521, 528 (1973)).

Appellants contend that DS designed the Embassy's contracts for employing local guards, handled all payments to UIIS, and regularly provided advice regarding the contracts. *See* Appellants' Br. at 33. They also contend that the contract required UIIS to provide the State Department with the names of the local guards it employed, to submit

the names of all personnel to the Department for approval, to ensure that guards wear uniforms approved by the Department, and to conduct inventories as directed by the Department. *Id.* Far from demonstrating day-to-day State Department supervision of the contractor, however, these allegations establish only that "the contract set forth detailed guidelines and regulations that the contractor was required to conform with as it implemented its hiring, supervision and training of Embassy local guards." *Macharia*, 238 F. Supp. 2d at 28. As the Supreme Court held in Orleans, the government may "fix specific and precise conditions to implement federal objectives" without becoming liable for an independent contractor's negligence. *Orleans*, 425 U.S. at 816.

To be sure, appellants presented evidence that supervision of the UIIS contract amounted to a "full time job for one [Assistant Regional Security Officer]." Appellants' Br. at 34. Although this may well constitute the sort of day-to-day supervision falling outside the independent contractor exception, Assistant Regional Security Officers are located overseas—in this case, in Nairobi—and the FTCA's sovereign immunity waiver does not extend to acts or omissions arising in territory subject to the sovereign authority of another nation. *See* 28 U.S.C. § 2680(k); *see also United States v. Spelar*, 338 U.S. 217, 221 (1949) (purpose of foreign country exception is to avoid having another country's law define the scope of the federal government's tort liability). Moreover, to the extent that appellants allege negligent supervision of local guards by State Department employees located in the United States, those allegations are, for the reasons given above, barred by the discretionary function exception. *See supra* pp. 6-10.

Appendix A

III.

Having considered appellants' remaining arguments and finding no basis for questioning the district court's disposition, we affirm in all respects.

So ordered.

APPENDIX B — ORDER GRANTING MOTION TO DISMISS AND ACCOMPANYING MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA ENTERED JULY 30, 2002

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 99CV3274 (CKK)

MERINA M. MACHARIA, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION
(July 30, 2002)

Presently pending before the Court is Defendant United States' Motion to Dismiss Plaintiffs' Amended Complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), and for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiffs, representing a prospective class of over five thousand Kenyan citizens and businesses, bring this action in connection with the August 7, 1998, terrorist bombing of the United States Embassy in Nairobi, Kenya (the "Embassy"). Plaintiffs allege that Defendant's negligence related to the security of the Embassy

compounded Plaintiffs' injuries and losses suffered as a result of the bombing. Upon review of Defendant's motion to dismiss, memorandum of law and attached exhibits, Plaintiffs' opposition thereto, Defendant's reply, and the relevant law, the Court shall grant Defendant's motion to dismiss.

I. BACKGROUND

On August 7, 1998, a terrorist bomb exploded at the rear entrance to the American Embassy in Nairobi, Kenya, killing over two hundred people, injuring thousands more, and damaging Kenyan businesses located near the Embassy. Plaintiffs' Amended Complaint ("Cplt.") at 68. The bombing injured those inside the Embassy compound, and led to the collapse of the adjacent Ufundi Building. *Id.* ¶ 71. Additional injuries occurred when glass windows shattered at the nearby Co-op Bank Building. *Id.* It is believed that the bombing was carried out by the *al Qaeda* terrorist organization, led by Osama bin Laden. *Id.* ¶ 69.

Plaintiffs complain that the "actions and inactions by the United States of America, principally through the Department of State, created circumstances which permitted the Bombing and subsequently caused and exacerbated the loss and injury sustained by Kenyan victims." *Id.* at 68. Specifically, Plaintiffs allege in Count One that the Embassy was inherently dangerous and that employees of the Department of State ("DOS") knew or should have known that a terrorist attack against the Embassy was likely. Cplt. ¶¶ 82-94. Despite this knowledge, Plaintiffs argue, DOS employees failed to alert their superiors, the Embassy, and

Kenyan citizens that such dangers were imminent. *Id.* ¶¶ 57, 91 Additionally, Plaintiffs assert that DOS employees failed to provide sufficiently trained security personnel to the Embassy and failed to take necessary security precautions to prevent such an attack. *Id.* ¶¶ 88- 89. Plaintiffs allege further that the United States "made security and rescue related decisions based on race and national origin." Cplt. ¶ 92. Plaintiffs also allege that the United States is responsible, based on the doctrine of *respondent superior,* for the negligence of the independent contractor providing security services at the Embassy. *Id.* ¶¶ 52, 75, 88. As a result of this alleged failure to provide appropriate security, Plaintiffs claim in Count Two that the Embassy was a public and private nuisance that "deprived neighbors of the use and enjoyment of their adjoining property." *Id.* ¶¶ 95-98. In Count Three, Plaintiffs maintain that the United States violated international customary law, the Kenyan Constitution, and the International Covenant on Civil and Political Rights ("ICCPR") by its alleged security failures. *Id.* ¶¶ 99-106. Plaintiffs, in Count Four, request relief in the form of a constructive trust, to hold any assets or funds seized by the United States from Osama bin Laden and *al Qaeda* for the "use, benefit, and enjoyment of the plaintiffs and prospective class members." Cplt. ¶ 109. Plaintiffs allege that this Court possesses jurisdiction over the present action pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671 *et seq.*, which operates as a limited waiver of the United States' sovereign immunity. Cplt. at 68.

Defendant moves to dismiss Plaintiffs' Complaint on the grounds that it is not amenable to suit in this Court based on the foreign country exception, 28 U.S.C. § 2680(k), and

discretionary function exception, 28 U.S.C. § 2680(a), to the FTCA's waiver of sovereign immunity. Defendant's Memorandum of Law ("Def.Mem.") at 14, 17. Defendant contends first that Plaintiffs have failed to demonstrate that any of the alleged negligent conduct complained of occurred within the United States. *Id.* at 14-17. Second, Defendant argues that any actions that may have taken place within the United States clearly fall within the discretionary exception to the FTCA. *Id.* at 17-30. Finally, Defendant asserts that Plaintiffs fail to state a claim predicated on international and Kenyan law and fail to state a claim for a constructive trust. *Id.* at 2, 37-38.

II. DISCUSSION

A. *Legal Standard*

In reviewing a motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), a court will not grant the motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). Accordingly, at this early stage in the proceedings, the Court assumes the veracity of all factual allegations set forth in Plaintiff's Complaint. *See Doe v. United States Dep't of Justice,* 753 F.2d 1092, 1102 (D.C.Cir. 1985). Moreover, "[t]he complaint must be 'liberally construed in favor of the plaintiff,' who must be granted the benefit of all inferences that can be derived from the facts alleged." *Schuler v. United States,* 617 F.2d 605, 608 (D.C.Cir. 1979). Nonetheless, the Court is not bound to accept the legal conclusions of the

non-moving party. *See Taylor v. FDIC,* 132 F.3d 753, 762 (D.C. Cir. 1997).

Before a federal court may hear a case, it must ascertain whether it has jurisdiction over the underlying subject matter of the action. *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 541 (1986) ("Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto."). Motions to dismiss for lack of jurisdiction over the subject matter of the action are proper under Federal Rule of Civil Procedure 12(b)(1). In the Rule 12(b)(1) context, the plaintiff bears the burden of proving jurisdiction. *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 182-183 (1936); *Land v. Dollar,* 330 U.S. 731, 735 (1947). When a defendant brings a challenge to the actual complaint itself, without relying on matters outside the pleadings, the motion to dismiss is a "facial challenge" to a complaint, because a district court is not asked to review documents outside the pleadings. *See Hohri v. United States,* 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds,* 482 U.S. 64 (1987) (materials *aliunde* pleadings can be considered on Rule 12(b)(1) motion); 2 James Wm. Moore et al., *Moore's Federal Practice,* § 12.30[4], at 39 (3rd ed. 2002) ("A facial attack questions the sufficiency of the pleading."). On a motion to dismiss a case that presents such a "facial challenge," a court must accept all of the complaint's well- pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor. *United Trans. Union v. Gateway Western R. Co.,* 78 F.3d 1208 (7th Cir.1996) (*citing Rueth v. EPA,* 13 F.3d 227, 229 (7th Cir. 1993)).

However, in some instances, a court is required to look beyond the pleadings and to inquire into facts that are pertinent to the determination of whether it has subject matter jurisdiction. *Land,* 330 U.S. at 735 n.4. Such a "factual challenge" attacks the existence of subject matter jurisdiction by looking beyond the pleadings and places the burden on the plaintiff to prove that facts exist that establish a court's jurisdiction. *See Federal Election Com. v. National Rifle Assoc.*, 553 F. Supp. 1331, 1343 (D.D.C.1983) ("A 'factual attack,' however, challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered. Moreover, a 'factual attack' under Rule 12(b)(1) may occur at any stage of the proceedings, and plaintiff bears the burden of proof that jurisdiction does in fact exist.") (internal citations omitted).

In this instance Defendant brings a factual challenge to the existence of subject matter jurisdiction and thus, Plaintiff bears the burden of presenting proof that jurisdiction properly lies with this Court.

B. *The Federal Tort Claims Act*

Absent an express waiver of sovereign immunity, a plaintiff may not sue the United States in federal court. *See FDIC v. Meyer,* 510 U.S. 471, 474 (1994); *see also United States v. Mitchell,* 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."). The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-80, creates an express limited

waiver of the United States' sovereign immunity, rendering the federal government and its agencies liable for certain "tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674(a). While the FTCA creates the jurisdictional basis for tort claims brought against the United States, the underlying claims are determined according to local law.

In enacting the FTCA, Congress explicitly preserved the federal government's immunity from suit for claims "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) ("discretionary function exception"). A plaintiff must further demonstrate that the complained of act or omission by the United States does not arise in a foreign country. *See* 28 U.S.C. § 2680(k) ("foreign country exception"). If a claim falls within one of these FTCA exceptions, the Court does not possess subject matter jurisdiction and must dismiss the action.

C. *Defendant's motion to dismiss for lack of subject-matter jurisdiction Fed. R. Civ. P. 12(b)(1).*

Defendant moves to dismiss Counts One and Two of Plaintiffs' Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) based on the discretionary function and the foreign country exceptions to the FTCA. At the outset,

the Court must address Plaintiffs' erroneous assertion that Defendant's motion to dismiss Plaintiffs' complaint pursuant to Federal Rule of Procedure 12(b)(1) must be treated as a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiffs' Opposition to Defendant's Motion to Dismiss Complaint ("Pl.Opp'n") at 4-6. Plaintiffs contend that attacks as to jurisdiction pursuant to Rule 12(b)(1) "should be limited to complaints which establish failure to exhaust administrative remedies, or which establish that the tort upon which the complaint is based falls within one of the explicit exceptions set out in 28 U.S.C. § 2680(h)."[1] Pl. Opp'n at 4. Plaintiffs argue that where, as here, a defendant moves to dismiss a claim based upon the discretionary function exception or the foreign country exception to the FTCA, courts should apply the "heightened requirements of Rule 12(b)(6)" and treat all factual allegations—including those related to jurisdiction—in the complaint as true. *Id.*

Plaintiffs' assertion has little merit. As discussed above, when a court is required to look beyond the pleadings to establish its jurisdiction, a plaintiff must through testimony and affidavits, demonstrate that a case is properly before the court. *See Land,* 330 U.S. 735. This Court must review the allegations in Plaintiffs' Complaint, and may review facts outside of the pleadings, in order to determine whether jurisdiction exists. In this instance, that means examining facts related to where the alleged negligent actions took place,

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1. 28 U.S.C. § 2680(h) creates an exception to the waiver of immunity for "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

at home or abroad, and whether Defendant's actions were in fact discretionary in nature. However, "we do so only to determine whether the district court has jurisdiction over those actions, not to prejudge the merits of the case. If the district court has jurisdiction over the suit, the plaintiff must still prove that the government's actions were negligent in order . . . to prevail." *Cope v. Scott,* 45 F.3d 445, 448 (D.C. Cir. 1995).

The cases cited by Plaintiffs do not indicate otherwise. Plaintiffs primarily rely on *Richardson v. United States,* 193 F.3d 545 (D.C. Cir. 1999), for the contention that a motion to dismiss based on the discretionary function must satisfy the heightened requirements of Rule 12(b)(6). To the contrary, that case directly found that "no one doubts that [the plaintiff's] original complaint would properly be dismissed for lack of subject matter jurisdiction, because of the discretionary function exception." *Richardson,* 193 F.3d at 547. The issue in *Richardson* dealt with whether the district court had erred in denying a *pro se* plaintiff a chance to amend his complaint in order to state a cognizable claim. Nowhere, does the *Richardson* court indicate that, in applying the discretionary function exception, a court is unable to dismiss a claim pursuant to Rule 12(b)(1) and in fact, recognized that such dismissal was appropriate as to the plaintiff's original complaint. *Id.*

Further, Plaintiffs contend at the outset that this Court should not dismiss the action pursuant to Rule 12(b)(1) because Plaintiffs have not had the opportunity to conduct sufficient jurisdictional discovery in this case. Pl. Opp'n at 8. Plaintiffs argue that Defendant has failed to produce certain

requested documents that pertain to how the DOS identifies terrorist threats and how the DOS makes decisions regarding who to notify regarding such threats. *Id.* Without this information, Plaintiffs argue, "Defendant . . . is precluded from making a factual attack on the threat reaction claims in this case." *Id.* at 8.

Plaintiffs argument is merely an attempt to re-litigate matters already resolved by this Court and the Magistrate Judge in this case. Plaintiffs were afforded three months of discovery on the jurisdictional question, during which time they had the opportunity to submit interrogatories, depose witnesses, and request documents from the Defendant. *See* December 17, 2001, Order; Civ. No. 99-3274(CKK) at 3, Plaintiffs were permitted to take Federal Rule of Civil Procedure 30(b)(6) depositions of United States personnel[2] regarding "how and where the Department made decisions concerning security, local guards, training, and management of threat information." *See* October 3, 2001, Order Civ. No. 99-3274(AK) at 6. Magistrate Judge Alan Kay denied Plaintiffs' requests for additional discovery and resolved all of Plaintiffs' challenges concerning the sufficiency of Defendant's compliance with discovery requests. *See Id.* Magistrate Judge Kay subsequently clarified his Order of October 3; explaining that Defendant was not required to "produce responses which address both jurisdictional and factual issues." October 30, 2001, Order Civ. No. 99-

2. The Court notes that Plaintiffs also had an opportunity to take five Rule 30(b)(5) depositions on the jurisdictional question in a related action before this Court, dismissed on March 30, 2002, *Bicharge v. United States,* Civ. Action No. 00-1636 (D.D.C. March 30, 2002).

3274(AK) at 2. Consequently, this Court concludes that Plaintiffs have had ample opportunity to obtain information from Defendants concerning the jurisdictional issue and reiterates that "Plaintiffs are not entitled to further jurisdictional discovery." Dec. 17, 2001, Order at 3.

1. *Discretionary Injunction Exception*

The Court will begin its analysis with the discretionary function exception. All of Plaintiffs' claims contained in Counts One and Two, save one, related to the negligence of the independent contractor, and can be resolved pursuant to this exception.[3]

Pursuant to the discretionary function exception, the United States retains sovereign immunity for any acts taken by a federal employee that are "based upon the exercise or performance or the failure to exercise or perform a

3. Plaintiffs, in recognition of the foreign country exception, have attempted to demonstrate that the injuries and property damage suffered in Kenya were the result of negligent acts or omissions committed within the United States. *See* Cplt. ¶¶ 40-62. This type of claim is known as a "headquarters" claim. *See Beattie v. United States*, 756 F.2d 91 (D.C. Cir. 1984). However, headquarters claims are "recognized by this Circuit . . . in such limited circumstances that in general, 'unless subject matter jurisdiction can be separately established for those claims truly arising in a foreign country . . . it is seldom worth [plaintiffs'] while to try to make a case live or die on the basis of headquarters claims.'" *MacCaskill v. United States*, 834 F.Supp. 14, 17 (D.D.C.1993), *aff'd without opinion* 24 F.3d 1464 (D.C. Cir. 1994) (quoting *Beattie*, 756 F.2d at 97). The Court for the purposes of its discussion of the discretionary function analysis will assume that Plaintiffs have properly alleged a headquarters claim.

discretionary function or duty." 28 U.S.C. § 2680(a). This exception applies to governmental acts that "involve an element of judgment or choice." *United States v. Gaubert,* 499 U.S. 315, 323 (1991) (quoting *Berkovitz v. United States,* 486 U.S. 531 (1988)). The purpose of the exception "is to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort," *Gaubert,* 499 U.S. at 323 (internal citations omitted). In determining the applicability of the discretionary function exception, the Court undertakes a two part test. First, the Court must determine whether a federal statute, regulation, or policy specifically prescribes a government actor's course of action. *Id.* at 322. In such a case, no discretion is employed and the only remaining inquiry for the Court is whether the employee did, or did not, do what was prescribed by the applicable statute, regulation or policy. *See Cope v. Scott,* 45 F.2d 445, 448 (D.C. Cir. 1995). Second, if no specific action is prescribed, the act is discretionary, and the court must next determine whether the action was of the type grounded in social, economic, or political policy. *Sloan v. U.S. Dep't of Housing & Urban Dev.,* 236 F.3d 756, 761 (D.C. Cir. 2001) (citing *Gaubert,* 499 U.S. at 323). If an "established governmental policy, as expressed or implied by statute, regulation or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agents' acts are grounded in policy when exercising that discretion." *Gaubert,* 499 U.S. at 324-325. Once it is established that the government actions in question are discretionary in nature and grounded in an appropriate policy, a court lacks subject matter jurisdiction over claims predicated upon that discretionary action (or inaction).

Appendix B

Plaintiffs contend that officials in the United States committed twenty-one negligent acts that were either non-discretionary or not subject to "policy judgment." Pl. Opp'n at 29-30. All of these allegedly negligent acts can be categorized as either: 1) a failure to provide guidance and advice on improving security at the Embassy, 2) a failure to provide security equipment to the Embassy, 3) a failure to train adequately Embassy personnel and contractors to deal with various security threats, 4) a failure to warn adequately Embassy personnel, and others, of potential terrorist threats, 5) an improper classification of the level of security risk at the Embassy, or 6) falsely leading Embassy personnel to believe that security analyses had been conducted or would be conducted. *Id.* The Court concludes that each of these alleged actions fall within the discretionary function exception to the FTCA.

a. Mandatory vs. Discretionary Conduct

None of the actions about which Plaintiffs complain involve a failure to abide by the dictates of a statute, guideline or regulation. Although Plaintiffs repeatedly assert that DOS officials failed to fulfill "non- discretionary" duties, Pl. Opp'n 15, 22, Plaintiffs fail to identify any relevant statute, guideline, or regulation that prescribed DOS employees' course of action related to the security at the Embassy. Plaintiffs cite documents that either are not guidelines prescribing a specific course of action, or are guidelines that do not apply to Plaintiffs' specific claims. Plaintiffs' failure to identify a relevant guideline or regulation is not surprising as determinations about what security precautions to adopt at American embassies, and what security information to pass

on, and to whom this information should be given, do not involve the mechanical application of set rules, but rather the constant exercise of judgment and discretion. For instance, the United States Department of State Foreign Affairs Manual, Diplomatic Security ("FAM"), Def. Mem; Exhibit 2, instructs, in the "Physical Security Standards" section, that "[p]roject managers and regional security officers (RSO's) should follow all standards *to the maximum extent possible.*" Def. Mem; Exhibit 2, 12 FAM 314.1 (emphasis added).[4] This Manual further instructs that when full implementation of outlined standards is "impossible or inappropriate," foreign service officers should engage in a process of "[r]isk management." *Id.* 12 FAM 6 H 511.4. This risk management "process begins with an assessment of the value of the assets, the degree of a specific type of threat, and the extent of the vulnerabilities. . . . A decision is then made as to what level of risk can be accepted and which countermeasures should be applied. Such a decision involves a cost-benefit analysis, giving decision makers the ability to weigh varying security risk levels against the cost of specific countermeasures." *Id.* Thus, as this document clearly illustrates, the process of securing an embassy involves subjective analysis, decisions, and a balancing of benefits; it does not involve the mechanical application of guidelines or rules.

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4. In *Cope*, the plaintiff cited a Park Service manual that established road safety standards "applicable only 'to the extent practicable.' " 45 F.3d at 450. In response, the Court of Appeals for the District of Columbia Circuit observed that "this caveat means that the standards are applicable only when no competing priorities exist. *Such flexibility is the essence of discretion.*" 45 F.3d at 450 (emphasis added).

In addition, Plaintiffs attempt to demonstrate that certain DOS reports establish that the security measures taken prior to the 1998 attack were "inadequate," and contained "identified deficiencies." Pl. Opp'n 20-21. However, Plaintiffs arguments as to the inadequacy or deficiency of the level of security that in hindsight would have been desirable on the day of the bombing is merely an attempt to argue the merits of the case, rather than evidence that Defendant failed to comply with certain mandatory guidelines and regulations.[5] In sum, none of the actions or instances of inaction that form the basis of Plaintiffs' Complaint involve a failure to perform nondiscretionary duties. Therefore, this Court turns to the next step in the *Gaubert* analysis and must determine whether DOS employees' alleged actions and inactions implicated social, political, or economic policy considerations. *Cope,* 45 F.3d at 448-49.

b. Political, Social, and Economic Policy Considerations

Under the FTCA discretionary function exception, not all discretionary conduct is exempted; only conduct that is

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5. The Court must also note that Plaintiffs frequently cite to inapplicable or irrelevant guidelines in order to attempt to demonstrate that mandatory duties exist. For instance, Plaintiffs make a weak attempt to suggest the existence of "certification requirements," for bomb detection equipment. Pl. Opp'n at 20. Yet the document cited relates to the safety of X-ray devices used by embassy personnel. B. 6085. Similarly, Plaintiffs attempt to suggest that the building's windows did not meet DOS security standards. Pl. Opp'n at 21. Yet the standards cited by Plaintiffs pertain only to newly acquired or renovated embassy buildings. B. 7691, 9195. The Embassy in Nairobi was not such a building. B. 3500.

"susceptible to policy judgment and involve[s] an exercise of political, social or economic judgment" is exempt. *Cope v. Scott,* 45 F.3d 445 (D.C. Cir. 1995) (internal citations omitted). Decision-making based on policy considerations has been contrasted with "determinations involving the 'application of objective scientific standards;' " the latter are not protected by sovereign immunity even when they involve the exercise of discretion. *Sloan,* 236 F.3d at 765. However, when "balancing factors" is an integral part of the decision-making process, and particularly when this involves considerations such as how to "allocat[e] funds among significant project demands," and how to weigh inconvenience against "the risk of safety hazards," decisions are susceptible to policy judgment. *Cope,* 45 F.3d at 451; *see also United States v. S.A. Empresa de Viacao Aerea Rio Grandense ("Varig Airlines"),* 467 U.S. 797, 820 (1984) (finding that decisions that require the government to "establish priorities for the accomplishments of its policy objectives by balancing the objectives sought . . . against such practical considerations as staffing and funding," implicate the discretionary function exception).

Moreover, "it is the nature of the conduct, rather than the status of the actor," that governs whether the conduct is based on policy considerations. *Varig Airlines,* 467 U.S. at 813. Thus, the fact that security related decisions may not have been taken by high level government officials is irrelevant to the question of whether those decisions implicate economic, social or political policies. Even "day-to-day 'operational' decisions" of a federal agency often implicate policy considerations. *Gaubert,* 499 U.S. at 332; see also

Appendix B

Sloan v. Dep't of Housing and Urban Development, 236 F.3d 756, 762 (D.C.Cir.2001) ("the discretionary function exception . . . does not apply 'exclusively to policymaking or planning functions,' but rather extends as well to decisions made at the operational level.").

The conduct at issue in this case and the decisions regarding what action to take related to security clearly are "susceptible to policy analysis" and thus the discretionary function exception is applicable. Plaintiffs attempt to argue that decisions regarding whether or not to warn Embassy employees and Kenyan citizens about a possible terrorist threat and decisions regarding "how best to secure the Embassy's premises" did not implicate political, social or economic policy considerations. Pl. Opp'n at 37-41. Plaintiffs argue that Defendant's actions related to the alleged security failures at the Embassy "could not evoke social wisdom . . . political practicality . . . or economic expediency ... Rather, that conduct implicates negligence . . . due care . . . and reasonableness, and fall well outside the confines of discretionary functions." Pl Opp'n at 40, (quoting Declaration of J. Jerome Bullock) (omissions in original). However, Plaintiffs fail to counter Defendant's specific arguments that the decisions made by DOS and its employees in relation to how best to secure the Nairobi Embassy implicated specific policy concerns.

Decisions regarding how much safety equipment should be provided to a particular embassy, how much training should be given to guards and embassy employees, and the amount of security-related guidance that should be provided necessarily entails balancing competing demands for funds

and resources. Each individual embassy's need for security must be balanced against the need perceived at other embassies, and the need for security must be balanced against the need for alternative projects that could consume scarce resources. Moreover, each of Defendant's decisions regarding security involved balancing potential inconvenience to State Department employees against the perceived security gains that would result from a safety measure.

Decisions regarding when and how to warn people of potential terrorist threats similarly involve a balancing of policy considerations. DOS employees must balance the cost and inconvenience that a false warning might cause against the risk that any given threat will materialize. Where such a warning might influence the actions of officials of foreign governments—as a warning about threats to a United States embassy likely would-American officials must also consider the effect that a warning, or the failure to give one, might have on that foreign government and American relations with it. Classification of the level of risk facing an embassy involves choices about what types of threats the United States considers most worrisome. It also involves determining how much risk, and what types of risk, should be required before an embassy is eligible for certain security measures. As risk classification makes a statement about conditions in the country where the embassy is located, it could also influence United States relations with that country, and therefore be influenced by the footing on which the United States seeks to maintain those relations.

It is exactly because such political, economic and social policy considerations must be balanced that Congress granted

the discretionary authority to the Secretary of State to "develop and implement . . . policies and programs, including funding levels and standards, to provide for the security of the United States Government operations of a diplomatic nature and foreign government operations of the diplomatic nature in the United States." 22 U.S.C. § 4801 (1990) (Omnibus Diplomatic Security and Antiterrorism Act). As the Act allows the Secretary to exercise discretion "it must be presumed that the [Secretary's] acts are grounded in policy when exercising that discretion." *Gaubert,* 499 U.S. at 324-325. The decisions made by Defendant regarding the security of the Embassy and warnings of possible threats are clearly discretionary in nature and grounded in policy and therefore, do not fall within the FTCA's waiver of sovereign immunity.

2. *Foreign Country Exception*

The FTCA also prohibits suits against the United States for acts or omissions arising in a territory subject to the sovereignty of another nation. 28 U.S.C. § 2680(k); *United States v. Spelar,* 338 U.S. 217, 219 (1949). Congress exempted actions arising in foreign countries from the FTCA because "it was unwilling to subject the United States to liabilities depending upon the laws of a foreign power." *Spelar,* 338 U.S. at 221. As noted above, while jurisdiction is determined by the FTCA, the underlying tort claims are decided based on the local law where the act or omission occurred.

The United States argues that the acts Plaintiffs complain of occurred, for all practical purposes, in Kenya, and are

therefore not actionable—even if negligent—due to the foreign country exception to the FTCA's waiver of immunity. Def. Mem. at 14-15. With one exception, which the Court addresses below, this Court need not address the question of whether Plaintiffs are complaining of acts that took place in Kenya, or acts that took place in the United States because, as discussed in Part II.C.1 above, the discretionary function exemption renders the United States immune from liability for such alleged acts or omissions. However, the Court discusses below Plaintiffs' allegations regarding Defendant's liability for the acts and training of local guards as such claims are not resolved by application of the discretionary function exception.

Plaintiffs allege that the United States is responsible under the doctrine of *respondeat superior* for the negligence of local guards employed by a private contractor, United Internal Investigative Services ("UIIS"), retained to provide Embassy security. Cplt. ¶¶ 52, 75, 88. Plaintiffs contend that the local guards were not properly trained to respond to the situation that arose on August 8, 1998, and that Defendant is responsible for this failure to train and the negligent acts of the local guards. *Id.* UIIS contracted with the Embassy in Nairobi agreeing to provide local guard services for the Embassy. Def. Mem at 12, Exhibit 3 (UIIS Contract). UIIS' responsibilities under the contract included providing "basic training,[6] firearms qualifications, and annual recertification training" for the local guards. Def. Mem, Exhibit 3 at 7498.

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6. Basic training included training in terrorism and criminality, training in mission emergency plans, and training in access control. Def. Mem., Exhibit 3 at 7498-99.

UIIS also hired managers responsible for security force training and provided security training for Embassy employees and the local guards. *Id.* at 7551. UIIS provided this training, and supervised the local guards in Nairobi, Kenya.

The Court is precluded from entertaining Plaintiffs' claims based on the actions of UIIS and the local guards it supervised for two reasons. First, the United States is immune from such claims of negligence pursuant to the foreign country exception. It is clear that "torts occurring on American embassies . . . which are located in foreign countries are barred by the foreign country exception." *Beattie* 756 F.2d at 97. Thus, actions taken by local guards on the day of the terrorist bombing clearly arose in a foreign nation and cannot be the subject of a claim brought under the FTCA. Second, the training, or lack thereof, that Plaintiffs complain of, also took place in Kenya, and not in the United States. Plaintiffs fail to demonstrate activities occurring within the United States that act as a basis for claims based on the failure to provide proper training to the local guards.

Moreover, the FTCA waiver of immunity does not cover tortious acts or omissions committed by independent contractors or their employees. *See* 28 U.S.C. § 1346 (sovereign immunity is waived only as to acts and omissions of federal employees; independent contractors are not federal employees); *United States v. Orleans,* 425 U.S. 807, 813 (1976). The FTCA waives sovereign immunity for tortious actions undertaken by "officers or employees of any federal agency . . . and persons acting on behalf of a federal agency in an official capacity." 28 U.S.C. § 2671. A federal agency

is defined as "the executive departments ... independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States *but does not include any contractor with the United States.*" *Id.* (emphasis added).

Plaintiffs contend that the United States supervised the day to day operations of UIIS, and thus, under the "control of physical conduct" test, UIIS was not a contractor with the United States, but rather an employee. Pl. Opp'n at 24. The crucial factor in distinguishing between a federal employee and an independent contractor is whether the Federal Government has the power to "control the detailed physical performance of the contractor." *Orleans,* 425 U.S. at 814-815 (quoting *Logue v. United States,* 412 U.S. 521 (1973)). Broad supervisory control, even on a daily basis, does not suffice to demonstrate control over the physical performance of the contractor. *Orleans,* 425 U.S. at 817 (finding that the fact that an independent community agency was required to comply with extensive government regulations did not create an employment relationship); *see also Gibson v. United States,* 567 F.2d 1237 (3d Cir. 1977), *cert denied,* 436 U.S. 925 (1978) ("The fact of broad, supervisory control, or even the potential to exercise detailed control, cannot convert a contractor into an agent, nor can it be the basis for imposing vicarious liability on the United States."). The United States Supreme Court explained in *Logue v. United States,* 412 U.S. 521(1973), that guidance from the government or requirements that a contractor comply with government regulations, does not establish the type of control necessary to form an employee—employer relationship under the FTCA. The Court found that an employee—employer

relationship did not exist between the United States and a local county jail although the jail was required to comply with Bureau of Prisons' rules and regulations prescribing standards of treatment, and although the United States reserved the right to inspect the jail. *Logue,* 412 U.S. 521. Similarly, the *Orleans* Court concluded that although the community action agencies at issue in that case were required to "comply with extensive regulations, which include employment policies and procedures, lobbying limitations, accounting and inspection procedures, expenditure limitations and programmatic limitations and applications procedures," the agencies were not "employees" under the FTCA. *Orleans,* 425 U.S. at 817-18. The *Orleans* Court noted that to find otherwise would "distort well established concepts of master and servant relationships and extend the meaning of the Federal Tort Claims Act beyond the intent of Congress." *Id.* at 819.

In this instance, it is clear that the United States, while retaining broad supervisory control over the local guards pursuant to the contract with UIIS, did not maintain control over the detailed physical performance of the contract. DOS regulations clearly state that "day to day activities are to be managed by and supervised by the contractor." Def. Reply Mem. at 18, Exhibit 9, 12 FAM 324.2(a). Plaintiffs assert that Defendant controlled the activities of the contractor in that the contract required the contractor to submit the names and information for each employee hired in order for the United States to undertake a security check of the potential employee. Pl. Opp'n at 24-25; Def. Mem, Exh. 3 at 7494. Additionally, the government contract set forth certain standards of conduct that the UIIS was required to comply

with, including requiring UIIS to "maintain satisfactory standards of employee competency" and to require certain uniforms approved by the United States. *Id.* Further, UIIS needed to ensure that local guards met the United States' requirements for education, language proficiency and health. *Id.* The contract also required UIIS to send the local guards it hired to orientation, and to provide certain specific training, including training in which the Embassy Regional Security Officer ("RSO") took part. *Id.* at 7498. Review of the UIIS contract, Def. Mem, Exh. 3, makes clear that Plaintiffs have not demonstrated that Defendant retained control over the detailed physical performance of the contractor, but rather, that the contract set forth detailed guidelines and regulations that the contractor was required to conform with as it implemented its hiring, supervision and training of Embassy local guards. As in *Orleans,* this type of general supervisory control that requires the contractor to comply with regulations and guidelines issued by the government, does not create the type of employee—employer relationship envisioned under the FTCA. The government may "fix specific and precise conditions to implement federal objectives" within a contract with an independent contractor. *Orleans,* 425 U.S. at 815-16 (finding that while the contractor was "responsible to the United States for compliance with the specifications of the contract, or by grant . . . [it was] largely free to select the means of its implementation."). Accordingly, the Court finds that Plaintiffs have not demonstrated that Defendant is liable for the acts of UIIS and the local guards under UIIS' control.

Consequently, the Court lacks jurisdiction to entertain Plaintiffs' claims contained in Count One and Two of

Plaintiffs' Complaint and Defendant's motion to dismiss as to these counts must be granted.

D. *Defendant's Motion to Dismiss Plaintiffs International Law Claims for Failure to State a Claim and for Lack of Subject Matter Jurisdiction.*

Count III of Plaintiffs' Complaint attempts to state a claim against the United States for violations of "principles of international law . . . [and] Chapter V of the Constitution of Kenya . . ." Cplt. ¶ 100. Plaintiffs assert that the United States' action and inaction related to the 1998 bombing violate both customary international law[7] and the International Covenant on Civil and Political Rights, XXX,1967 6 I.L.M. 368 (*entered into force* Mar. 23 1976, *entered into force for the United States* Sept. 8, 1992). Cplt. ¶ 105. Defendant moves to dismiss Count Three for failure to state a claim and for lack of subject matter jurisdiction. Def. Mem. at 18.

1. *Kenyan Law and the Kenyan Constitution*

Plaintiffs assert that the United States actions "interfered with the Protection of Fundamental Rights and Freedoms of the Individual, as set forth in Chapter V of the Constitution of Kenya, at sections 70, 72, 74, 76, 80, 81 and 82(2)." Cplt ¶ 100. As discussed at length above, the United States is immune from suit in the federal courts absent an express waiver of sovereign immunity. In this instance, Plaintiffs fail

7. Customary international law is defined as "customs and usages among nations of the world" and it is part of the law of the United States.

to identify any express waiver of immunity that would permit such a suit against the United States based on the laws of Kenya. Indeed, this is not surprising, as any waiver of immunity with respect to suits brought under foreign law would be inconsistent with the policy scheme embedded in the FTCA; the foreign country exception was added to the FTCA specifically to prevent plaintiffs from subjecting the United States to suits brought pursuant to foreign laws. *See Spelar,* 338 U.S. at 221 (noting that Congress exempted actions arising in foreign countries from the FTCA because "it was unwilling to subject the United States to liabilities depending upon the laws of a foreign power."). The United States has not waived its immunity with respect to suits brought under foreign law, thus, this Court lacks subject matter jurisdiction over Plaintiffs' claims brought under the Kenyan Constitution or other laws of Kenya.

2. *The International Covenant on Civil and Political Rights*

Plaintiffs assert that the United States' actions before and after the bombing of the U.S. Embassy in Nairobi violated articles 3, 6, 7, 9, 10, 17, and 26 of the International Covenant on Civil and Political Rights ("ICCPR"). Cplt. ¶ 105. As noted above, in order for the United States to be subject to suit, there must be an express waiver of sovereign immunity. There is no such waiver related to claims brought pursuant to the ICCPR. When the Senate ratified the ICCPR it did so with a declaration that articles 1 to 27 were not self-executing. 138 Cong. Rec. S4784 (daily ed. Apr. 2, 1992). A treaty that is not self executing requires further action by Congress to incorporate it into domestic law and without such

action courts may not enforce such a treaty. *See Buell v. Mitchell,* 274 F.3d 337, 372 (6th Cir.2001) (quoting Restatement (Third) Of Foreign Relations Law § 111 (1987)) ("Courts in the United States are bound to give effect to international law and to international agreements, except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary authority."). Courts have uniformly held that the ICCPR is not self-executing and that, therefore, it does not give rise to a private right of action. *See, e.g., Igartua De La Rosa v. United States,* 32 F.3d 8, 10 n.1 (1st Cir.1994) *cert. denied,* 514 U.S. 1049 (1995) ("Articles 1 through 27 of the Covenant were not self-executing, and could not therefore give rise to privately enforceable rights under United States law".); *Ralk v. Lincoln County,* 81 F.Supp.2d 1372, 1380 (S.D. Ga. 2000) (neither legislative nor executive branch intended ICCPR to be self-executing and no private right of action was created); *White v. Paulsen,* 997 F. Supp. 1380, 1387 (E.D. Wash. 1998) (ICCPR not self-executing treaty that gives rise to private cause of action); *Reaves v. Warden,* 2002 U.S. Dist. LEXIS 6280 (M.D. Pa. March 22, 2002) (same); *Weaver v. Torres,* 2000 U.S. Dist. LEXIS 19529 (D. Md. November 15, 2000) (dismissing the plaintiff's claim under the ICCPR because it does not create a private right of action). Accordingly, Plaintiffs claim based on the ICCPR must be dismissed for failure to state a claim and for lack of jurisdiction.

3. *Alleged Violations of Customary International Law*

Plaintiffs assert that "the United States is required to ensure the following rights which have achieved status as

customary international law: avoidance of cruel, inhuman or degrading treatment or punishment, avoidance of prolonged arbitrary detention, and avoidance of systematic racial discrimination." Cplt. ¶ 103. The Restatement (Third) of Foreign Relations Law defines customary international law as the "general and consistent practice of states followed by them from a sense of legal obligation." 1 Restatement (Third) Of Foreign Relations Law § 102(2). Certain customary international laws rise to the level of "jus cogens" meaning they are norms that "are recognized by the international community of states as peremptory [norms], permitting no derogation." *Id.* at § 102. The Court of Appeals for the District of Columbia Circuit has noted that not every violation of international law, even if committed by the United States, is actionable in a United States court. *Committee of United States Citizens Living in Nicaragua v. Reagan,* 859 F.2d 929, 936 (D.C. Cir. 1988). The *Citizens Living in Nicaragua* court makes clear that violations of those portions of customary international law that have not achieved *jus cogens* status are clearly not actionable. *Id.*

Plaintiffs have not sufficiently alleged a cause of action under customary international law. Foremost, Plaintiffs have failed to indicate what conduct by the United States violated international law. It appears from the Complaint that Plaintiffs' first allegation regarding "cruel, inhuman, or degrading treatment or punishment," Cplt. ¶ 103, refers to the United States' failure to warn Kenyans of a threat whose validity was in doubt, exclusion of Kenyans from areas around the bombing where rescue and cleanup efforts were ongoing, and a failure to provide the same assistance to Kenyans as the United States provided to its own nationals.

The suggestion that such actions rise to a violation of international norms against cruel, inhuman, or degrading punishment lacks merit.

Plaintiffs also allege that the United States violated a customary international law norm against "prolonged arbitrary detention." *Id.* This accusation clearly refers to the fact that after the bombing, "Kenyans were denied access" to certain areas, "and their movements and actions were restricted by the United States." Cplt. ¶ 77. Assuming arguendo that such action would qualify as "detention," Plaintiffs have still failed to allege that the action was "prolonged," or "arbitrary." Finally, plaintiffs allege that the United States violated customary international law norms against "systematic racial discrimination" in its handling of events in Kenya before and after the bombing. *Id.* ¶ 103. However, Plaintiffs fail to allege facts that would demonstrate that the United States' decisions regarding the provision of medical assistance to American nationals but not to Kenyans, rose to the level of systematic discrimination.

In sum, Plaintiffs fail to allege even the basic elements of a violation of the above mentioned international customs. Accordingly, the Court will dismiss Plaintiff's customary international law claims pursuant to Federal Rule of Civil Procedure 12(b)(6).

E. *Constructive Trust/Permanent Injunction*

Count Four of Plaintiffs' Complaint requests that this Court require the United States to hold any seized assets and funds of Osama bin Laden and *al Qaeda* in a constructive trust for the "use, benefit, and enjoyment of the plaintiffs

and prospective class members." Cplt. ¶ 109. "A constructive trust is a remedy that a court devises after litigation," *United States v. BCCI Holdings,* 46 F.3d 1185, 1190 (D.C. Cir. 1995), "to redress the injustice that would otherwise occur when one person has fraudulently or wrongfully obtained the property of another," *United States v. Taylor,* 867 F.2d 700, 703 (D.C. Cir. 1989). As this Court discussed in *Mwani v. United States,* Civ. Action No. 99-125 (Nov. 19, 1999), a constructive trust is not an independent cause of action. As this Court finds that dismissal of Counts One, Two and Three are appropriate, there is no basis on which to award injunctive relief or a constructive trust.

Political Question Doctrine

This Court, having concluded that it lacks subject matter jurisdiction over Plaintiffs' claims need not reach the issue of whether the Political Question doctrine bars this Court's review of the claims.

III. CONCLUSION

Based on the foregoing, the Court finds that Plaintiffs have failed to establish that this Court has subject matter jurisdiction over the claims against the United States alleged in Counts one and two of their complaint. Having failed to do so, the Court concludes that these Counts shall be dismissed with respect to Defendant United States for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). The Court also finds that Plaintiffs have failed to state a cognizable claim under international law. Therefore, Plaintiffs' Count Three shall be dismissed

with respect to Defendant United States pursuant to Federal Rule of Civil Procedure 12(b)(6). Finally, this Court finds that the because a request for a constructive trust is not an independent cause of action, Count Four must also be dismissed. Accordingly, Defendant's motion to dismiss is granted. An appropriate Order accompanies this Memorandum Opinion.

Dated: July 29, 2002

s/ Colleen Kollar-Kotelly
Colleen Kollar-Kotelly
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 99CV3274 (CKK)

MERINA M. MACHARIA, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is, this 29 of July, 2002, hereby

ORDERED that Defendant the United States of America's motion to dismiss is GRANTED; and it is further

ORDERED that this case is DISMISSED

SO ORDERED.

s/ Colleen Kollar-Kotelly
Colleen Kollar-Kotelly
United States District Judge

APPENDIX C — RELEVANT STATUTES AND CONVENTIONS

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI—PARTICULAR PROCEEDINGS
CHAPTER 171—TORT CLAIMS PROCEDURE

28 U.S.C. § 2671

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

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"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

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28 U.S.C. § 2674

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

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With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

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28 U.S.C.A. § 2680

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other

property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

> **(1)** the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
>
> **(2)** the interest of the claimant was not forfeited;
>
> **(3)** the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
>
> **(4)** the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law . . .[1]

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

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1. So in original. Second period probably should not appear.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[**(g)** Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

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(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

Appendix C

The United Nations
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

PREAMBLE

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

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PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self- Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

    1. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; to ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy,

    2. To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

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Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2),11, 15,16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized

herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under

the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

Appendix C

3.

1. No one shall be required to perform forced or compulsory labour;

2. Paragraph 3(a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

3. For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

    1. Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

    2. Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

    3. Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

    4. Any work or service which forms part of normal civil obligations.

Appendix C

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Appendix C

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

    1. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

    2. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order

(ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

    1. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

    2. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

    3. To be tried without undue delay;

    4. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance

assigned to him, in any case where the interests of justice so require, — and without payment by him in any such case if he does not have sufficient means to pay for it;

5. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

6. To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

7. Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence far which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

• No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. if, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

• Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Appendix C

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Appendix C

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

    1. For respect of the rights or reputations of others;

    2. For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Appendix C

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Appendix C

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equally of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Appendix C

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

1. To take part in the conduct of public affairs, directly or through freely chosen representatives;

2. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

3. To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Appendix C

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

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Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary-General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Appendix C

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the chairman of the meeting referred to in article 30, paragraph 4.

2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Appendix C

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such time as shall be provided in its rules of procedure,

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Appendix C

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

    1. Twelve members shall constitute a quorum;

    2. Decisions of the committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:

    1. Within one year of the entry into force of the present Covenant for the States Parties concerned;

    2. Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant, It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party

which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

1. If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication, the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter.

2. If the matter in not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State.

3. The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the mailer, in conformity with the generally recognized principles

of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.

4. The Committee shall hold closed meetings when examining communications under this article.

5. Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant.

6. In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information.

7. The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing.

8. The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

    1. If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

2. If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

   In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1.

1. If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with

the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

2. The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not party to the present Covenant, or of a State Party which has not made a declaration under Article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

Appendix C

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

    1. If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter.

    2. If an amicable solution to the matter on the basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

    3. If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written

submissions and a record of the oral submissions made by the States Parties concerned;

4. If the Commission's report is submitted under subparagraph (e), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Appendix C

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social council, an annual report on its activities.

PART V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of specialized agencies in regard to the matters dealt with in the present Covenant.

Appendix C

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the preset Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

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Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least on third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment

adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the State Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:

1. Signatures, ratifications and accessions under article 48;

2. The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

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Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

(Signatures)

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No. 03-562

In the Supreme Court of the United States

MERANIA MURINGU MACHARIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners are a prospective class of more than 5000 Kenyan citizens and businesses injured in the 1998 bombing of the United States Embassy in Nairobi, Kenya. This suit alleges that the United States negligently failed to secure the Embassy and to warn of the potential for a terrorist attack. The questions presented are:

1. Whether petitioners' claim under the Federal Tort Claims Act is barred by that statute's exceptions for conduct involving a discretionary function, claims arising in a foreign country, and conduct by independent contractors.

2. Whether the court of appeals correctly affirmed dismissal of petitioners' claims under the International Convention on Civil and Political Rights and customary international law.

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In the Supreme Court of the United States

No. 03-562

MERANIA MURINGU MACHARIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 334 F.3d 61. The opinion of the district court (Pet. App. 16a-46a) is reported at 238 F. Supp. 2d 13.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2003. The petition for a writ of certiorari was filed on October 9, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, waives the United States' immunity to suit

for damages arising from "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government * * * if a private person * * * would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). The waiver of immunity is limited by several exceptions, three of which are relevant here. First, the discretionary function exception bars claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). Second, the foreign country exception provides that the FTCA does not extend to any "claim arising in a foreign country." 28 U.S.C. 2680(k). Third, the waiver of sovereign immunity excludes suits arising from the conduct of contractors. In particular, the FTCA's waiver of immunity extends only to tortious acts committed by "officers or employees of any federal agency * * * and persons acting on behalf of a federal agency in an official capacity," which "does not include any contractor with the United States." 28 U.S.C. 2671. This Court has referred to that exclusion as "the independent contractor exception." *United States* v. *Orleans*, 425 U.S. 807, 814 (1976).

2. In August 1998, an explosives-laden truck dispatched by the al Qaeda terrorist network approached the entrance gate to the rear parking lot of the United States Embassy in Nairobi, Kenya. See Pet. App. 2a. An embassy guard refused to open the gate. The guard was a Kenyan who worked for a company that provided security services under contract with the State Department. See *ibid.* Blocked from entering the compound,

one of the two terrorists began shooting; the other threw a flash grenade at one of the guards. See *ibid.* Unarmed and unable to notify the Embassy's detachment of United States Marines either by telephone or radio, the guards ran for cover. *Ibid.* The terrorists detonated their explosives, causing massive damage to the Embassy and the surrounding areas. The explosion killed forty-four Embassy employees and approximately 200 Kenyan citizens; it injured 4000 others; and it caused the collapse of an adjacent building. *Ibid.*

Following the bombing, petitioners filed this action in the United States District Court for the District of Columbia on behalf of a prospective class of all Kenyan citizens and businesses injured in the bombing. Petitioners allege that government actions and inactions led to the bombing and exacerbated their injuries. See Pet. App. 2a-3a. Counts I and II of the complaint, brought under the FTCA, allege that the United States Embassy was inherently dangerous; that State Department employees knew or should have known about a likely attack on the Embassy; that, despite that knowledge, the State Department employees failed to warn their superiors, the Embassy, and Kenyan citizens; that the State Department failed to provide properly trained security personnel to the Embassy and to take necessary security precautions to prevent an attack; and that, as a result of those alleged shortcomings, the Embassy had become a private and public nuisance. See *id.* at 3a. Counts I and II also sought to hold the United States liable for the negligence of the Kenyan security guards employed by the private contractor. See *ibid.*

In Count III of the complaint, petitioners alleged that the government's security failures violated customary international law, the Kenyan Constitution, and the

International Covenant on Civil and Political Rights. See Pet. App. 3a. Count IV sought the formation of a constructive trust to hold any assets or funds seized by the United States from Osama bin Laden or al Qaeda for the benefit of plaintiffs and prospective class members. See *ibid.*

After jurisdictional discovery closed, the district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(1). See Pet. App. 16a. The court first held that petitioners' objections to the level of security surrounding the Embassy and the failure to warn of possible terrorist threats was barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a). "The decisions made by [the United States] regarding the security of the Embassy and warnings of possible threats," the court stated, "are clearly discretionary in nature and grounded in policy and therefore[] do not fall within the FTCA's waiver of sovereign immunity." Pet. App. 34a.

The district court also dismissed the claims based on the alleged negligence of the Embassy guards, holding them barred by the FTCA's independent contractor exclusion. The guards, the court held, were employees of an independent contractor, not employees or officers of the United States within the meaning of 28 U.S.C. 2671. Pet. App. 36a. The court also held that the claims relating to the guards' alleged negligence were barred by the FTCA's foreign country exception, 28 U.S.C. 2680(k). That alleged negligence occurred in a foreign country, as did the allegedly negligent failure to supervise the guards properly. Pet. App. 34a-40a.

Finally, the court dismissed petitioners' claims under the Kenyan Constitution, the International Covenant on Civil and Political Rights, and customary international law. Pet. App. 41a- 45a. The United States, the

court explained, is immune from suit in its own courts unless it has expressly waived its sovereign immunity. The court found that the United States had not waived its immunity to suit under the Kenyan Constitution or the International Covenant on Civil and Political Rights. See *id.* at 40a-41a. In addition, with respect to the international law claims, the court rejected petitioners' attempt to characterize the actions of the United States, immediately before and after the bombing, as violations of peremptory (or *jus cogens*) norms of customary international law. Petitioners, the court explained, "fail[ed] to allege even the basic elements of a violation" of international custom. *Id.* at 44a. Finally, the district court dismissed the claim for a constructive trust asserted in Count IV, explaining that "a constructive trust is not an independent cause of action." *Id.* at 45a.

3. The court of appeals affirmed. Pet. App. 6a. Like the district court, the court of appeals concluded that petitioners' claims relating to security at the Embassy and the failure to issue warnings were barred by the discretionary function exception to the FTCA. Applying a two-part test to determine whether the discretionary function exception applies, see *United States* v. *Gaubert*, 499 U.S. 315, 322 (1991), the court first concluded that petitioners had failed to establish that any "federal statute, regulation, or policy specifically prescribe[d]" a course of action that was not followed. See Pet. App 6a (quoting *Gaubert*, 499 U.S. at 322). Even if petitioners were correct that government officials had failed to follow an unwritten policy, the court continued, the alleged negligence regarding Embassy security involved broad concerns of social, political and public policy—precisely the sort of considerations the discre-

tionary function exception was designed to shield from judicial second-guessing. See *id.* at 10a-11a.

The court of appeals also agreed with the district court that the negligence claim concerning the conduct of the Embassy guards was barred by the contractor and foreign country exceptions to the FTCA. Pet. App. 13a-15a. First, the court observed that the guards were not officers or employees of a federal agency within the meaning of the FTCA. See *id.* at 13a-14a. Even if the guards' day-to-day activities were supervised by a federal employee, the court also held, that supervision took place entirely overseas and thus was barred by the foreign country exception. See *id.* at 14a. In addition, the court noted that the particular aspects of supervision alleged to be negligent or inadequate all involved discretionary functions. See *ibid.* Finally, the court concluded that there was no basis to question the district court's disposition of the remaining claims. See *id.* at 15a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. The court of appeals correctly determined that petitioners' claims of inadequate Embassy security and negligent failure to warn of possible terrorist actions against the Embassy were barred by the FTCA's discretionary function exception, 28 U.S.C. 2680(a). Under that exception, the alleged negligence of a federal employee is excluded from the waiver of immunity in the FTCA if it involves "acts that are discretionary in nature" and that involve "an element of judgment or choice" of the sort that the "exception was designed to

shield," *i.e.*, those "based on considerations of public policy." *United States* v. *Gaubert*, 499 U.S. 315, 322-323 (1991).

The court of appeals concluded that petitioners had failed to show that government employees acted contrary to the requirements of a specific, mandatory directive, and petitioners do not challenge that holding. See Pet. 16 n.8. Petitioners argue, however, that the court of appeals erred in determining that the decisions at issue were "of the kind that the discretionary function * * * was designed to shield," *Gaubert*, 499 U.S. at 322-323. According to petitioners, the court of appeals erred in grouping their allegations of negligence into six categories.[1]

Petitioners do not suggest that those categories were inaccurate or incomplete. And nothing in the cases cited by petitioners suggests that a court errs in its application of the discretionary function exception merely because it groups individual allegations of negligence into categories for purposes of analysis. To the contrary, other courts of appeals have used similar descriptions in analyzing FTCA claims. See, *e.g.*, *Nurse* v. *United States*, 226 F.3d 996, 1001 (9th Cir. 2000) (categorizing one part of the plaintiff's claim as alleging

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[1] The six categories identified by the court of appeals were:

> 1) a failure to provide guidance and advice on improving security at the Embassy, 2) a failure to provide security equipment to the Embassy, 3) a failure to train adequately Embassy personnel and contractors to deal with various security threats, 4) a failure to warn adequately Embassy personnel, and others, of potential terrorist threats, 5) an improper classification of the level of security risk at the Embassy, or 6) falsely leading Embassy personnel to believe that security analyses had been conducted or would be conducted.

Pet. App. 9a-10a.

"negligent and reckless employment, supervision and training" of customs officers by policy-makers).

Petitioners also err in contending that the court of appeals' decision effectively carved out from the FTCA "all security-related actions and decisions." Pet. 17. The court of appeals recognized that decisions pertaining to *embassy* security will often implicate the discretionary function exception where no mandatory directive governs the conduct at issue. Pet App. 10a-11a. That observation is surely correct. As the court noted, embassy security decisions typically involve accommodations between different embassies, between embassies and other programs, between security and accessibility for employees and visitors, and also involve foreign relations considerations. See *ibid.* Those are precisely the type of "decisions grounded in social, economic, and political policy" that are protected by the discretionary function exception. *Gaubert*, 499 U.S. at 323.

Although petitioners cite several cases from other courts of appeals, those cases arise from conduct wholly different from that at issue here. For example, the sort of judgment employed in the allegedly negligent cutting of timber at issue in *Marlys Bear Medicine* v. *United States*, 241 F.3d 1208 (9th Cir. 2001), see Pet. 20, encompasses none of the social, economic, political, and foreign relations policy considerations involved in determining what sort of security should be provided at United States embassies throughout the world.[2] Nor do *Andrulonis* v. *United States*, 924 F.2d 1210 (2d Cir.), vacated, 502 U.S. 801, reinstated, 952 F.2d 652 (2d Cir.

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[2] Petitioners' reliance on *Couzado* v. *United States*, 105 F.3d 1389 (11th Cir. 1997), is similarly misplaced; that case did not involve the discretionary function exception.

1991), cert. denied, 505 U.S. 1204 (1992), or *Dube* v. *Pittsburgh Corning*, 870 F.2d 790 (1st Cir. 1989), conflict with the decision in this case. See Pet. 21. *Androlunis* concerned the failure to warn a laboratory worker of "the extreme danger created by" manipulating a concentrated, lethal virus in a "leaky aerosolizing machine," 924 F.2d at 1221, while *Dube* concerned the failure to warn of the health risks from exposure to asbestos dust, 870 F.2d at 797. The decisions to warn (or not) in those cases quite obviously did not involve the sort of inherently discretionary and sensitive foreign policy and political decisions involved in deciding whether to warn foreign nationals of the potential for a terrorist attack on a U.S. embassy.

2. Petitioners similarly fail to demonstrate that the court of appeals and district court erred in holding that the FTCA's foreign country exception bars their claims based on the allegedly negligent supervision of the Embassy guards.[3] Contrary to petitioners' assertions, the court of appeals did not hold that negligent conduct occurring in the United States necessarily falls within the scope of the exception simply because its effects occur abroad. The court simply had no reason to address the so-called "headquarters" doctrine, Pet. 24-25, because it found that the allegedly negligent supervision—the negligent conduct itself and not merely the effects thereof—took place in a foreign country. See Pet. App. 14a. Petitioners cite no case recognizing a so-

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[3] The court of appeals also held that the negligence of the guards themselves could not be attributed to the United States because the guards were employees of an independent contractor. Pet. App. 13a-14a. See *United States* v. *Orleans*, 425 U.S. 807, 815 (1976). Petitioners do not challenge that holding.

called "headquarters" claim where the relevant negligence was found to have occurred abroad.[4]

To the extent petitioners purport to identify conduct inside the United States that the court of appeals allegedly overlooked, that case-specific claim of error does not warrant this Court's review. Besides, much of the domestic activity cited by petitioners—such as approving payment to the contractor who supplied the guards, Pet. 23-24—was neither negligent nor the cause of petitioners' injuries. Furthermore, to the extent petitioners appear to challenge the decision to use local guards to protect U.S. embassies, the scope of their use, or the type of training provided to them, those decisions once again are the sorts of discretionary political and policy determinations protected by the discretionary function exception. See Pet. App. 14a.

3. Finally, petitioners urge this Court to review the court of appeals' decision affirming dismissal of petitioners' claims under the International Covenant on Civil and Political Rights and customary international law. As an initial matter, the court of appeals' decision makes no law with respect to those matters. The court merely declared that it had "considered [petitioners'] remaining arguments" and found "no basis for questioning the district court's disposition." Pet. App. 15a. There is no compelling reason for further review of that summary statement.

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[4] For that reason, there is no reason to hold this case pending the Court's decision in *United States* v. *Alvarez Machain*, cert. granted, No. 03-485 (Dec. 1, 2003). That case concerns whether the foreign country exception applies where the conduct at issue was allegedly planned in the United States, but is alleged to be tortious only because it was undertaken abroad. In this case, the district court and court of appeals agreed that the relevant conduct occurred solely abroad.

Petitioners' claims are, in any event, foreclosed for at least three independent reasons. First, petitioners have failed to establish that the International Covenant on Civil and Political Rights affords them a private right of action. When the Senate ratified the International Covenant, it did so with a declaration that Articles 1 to 27 were not self-executing. 138 Cong. Rec. S4784 (daily ed. Apr. 2, 1992). As the district court explained, a court lacks authority to enforce a treaty that is not self-executing. Pet. App. 42a. The courts of appeals have thus uniformly concluded that the International Covenant does not provide privately enforceable rights. *Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140, 163 & n.35 (2d Cir. 2003); *United States* v. *Duarte-Acero*, 296 F.3d 1277, 1283 (11th Cir.), cert. denied, 537 U.S. 1038 (2002); *Hain* v. *Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002), cert. denied, 537 U.S. 1173 (2003); *United States ex rel. Perez* v. *Warden, FMC Rochester*, 286 F.3d 1059, 1063 (8th Cir.), cert. denied, 537 U.S. 869 (2002); *Buell* v. *Mitchell*, 274 F.3d 337, 371 (6th Cir. 2001); *Beazley* v. *Johnson*, 242 F.3d 248, 267 (5th Cir.), cert. denied, 534 U.S. 945 (2001); *Igartua De La Rosa* v. *United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994), cert. denied, 514 U.S. 1049 (1995) (per curiam).

Petitioners similarly cite no authority demonstrating that "customary international law" by itself creates a cause of action for damages enforceable in the courts of the United States, much less one actionable against the United States. See *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 777-778 & 780 n.4 (D.C. Cir. 1984) (Edwards, J., concurring) (explaining that international law generally does not create private causes of action to remedy violations, but rather leaves it to each nation to define the remedies that are available), cert. denied, 470 U.S. 1003 (1985); cf. *Buell*, 274 F.3d at 374 ("There

is no reported case of a court in the United States recognizing a cause of action under *jus cogens* norms of international law for acts committed by United States government officials against a citizen of the United States.").[5]

Second, even if petitioners had a right of action, petitioners cite no statute waiving the United States' sovereign immunity to damages actions brought under the International Covenant or customary international law. That is fatal to their claims. "It is an 'established principle of jurisprudence' that the sovereign cannot be sued in its own courts without its consent." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 67 (1989); *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983) (The United States "may not be sued" in its own courts "without its consent," and "the existence of consent is a prerequisite for jurisdiction.").[6]

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[5] Petitioners do not assert a cause of action under the Alien Tort Statute, 28 U.S.C. 1350. Accordingly, this case does not present any of the questions at issue in *Sosa* v. *Alvarez-Machain*, cert. granted, No. 02-385 (Dec. 1, 2003).

[6] Insofar as petitioners assume that no waiver of the United States' immunity is required for violations of *jus cogens* norms of international law, that assumption is incorrect. While some courts have addressed the claim that *foreign* nations may have impliedly waived their immunity for such violations under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, see *Sampson* v. *Federal Republic of Germany*, 250 F.3d 1145, 1150-1153 (7th Cir. 2001) (rejecting such a claim); *Princz* v. *Federal Republic of Germany*, 26 F.3d 1166, 1173-1174 (D.C. Cir. 1994) (same), cert. denied, 513 U.S. 1121 (1995), no court to our knowledge has suggested that such a theory could apply to the *United States' immunity to suit in its own courts*, which is not governed by the FSIA. In any event, the immunity of a sovereign from suit in its own courts—which "has been enjoyed as a matter of absolute right for centuries" and can be overcome only by "the sovereign's

Third and finally, petitioners do not show how the lower courts erred in rejecting their claim that the conduct of United States officials in the immediate aftermath of the terrorist bombing of the Embassy and their effort to aid victims amidst the chaos could plausibly be thought to have violated peremptory international norms. None of the Fourth Amendment or "systematic" discrimination cases cited by petitioner (Pet. 28-30) establish a conflict in the circuits or otherwise suggest that this case warrants further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2003

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own consent"—is distinct from the immunity that a foreign sovereign might claim in another sovereign's courts. See *Nevada* v. *Hall*, 440 U.S. 410, 414 (1979). Unlike the United States' constitutional immunity to suit in its own courts, "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).